Supreme Court, U.S.
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In The
Supreme Court of the United States

Gerald J. Gesiorski and
Dawn S. Gesiorski,
Petitioners,

v.

BRANCH BANKING & TRUST CO.,
f/k/a Carroll County Bank & Trust,
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit;
Questioning the Jurisdiction of
The United States Bankruptcy Court
For The Middle District of Pennsylvania,
Article I Judge

VERIFIED EMERGENCY PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the interest of Justice, Petitioner presents to this Honorable Court a vexed question; one recognized, directly and/or indirectly, by Congress, the Attorney General, and this Honorable Court, causing irreparable harm, as well as, affecting the Constitutional, Substantive and Fundamental Rights of Petitioner and litigants, past, present and future, throughout the Nation, yet remains undetermined to date.

1. **Does the Bankruptcy Judge**, lack "**jurisdiction of the subject-matter**", exceeding jurisdiction to render a judgment or order, executing authority received **under Article I**, sitting in a "**Voluntary**" action for "**Reorganization**", which is an "**Equity**" proceeding, "**arising under this Constitution, the laws of the United States**", applicable " **to Controversies *** between Citizens of different States**;...", which demands adjudication by a Constitutionally prescribed **Article III Judge**; thereby being deprived of authority to act in "**Equity**", acting ultra vires rendering any determination and judgment in that cause of action void and in violation of Constitutional, Substantive and Legislative Rights of litigants to Redress of Grievance, Due Process of Law, and Equal Protection of the Laws before an Article III Judge, as well as violation of Public Policy?

2. Did the District Court, being the Court of original jurisdiction, err "wherein the court shall look to the substance of the complaint rather than the form" refusing to expand the Record, and, air and address each issue raised before the Court contained within Petitioners pleadings creating an **impossibility** for that tribunal **to reach correct findings of fact and conclusions of law**?

3. Should the District Court have found the Mortgage Note to be void, tainted with the contamination of the originating acts of the Officers of Carroll County Bank & Trust?

4. Did the Circuit Court and District Courts violate Petitioners Constitutional, Substantive and Fundamental Rights by applying their General Rule of accountability for action of Attorney, instead of judging if counsel provided effective representation by a standard of normal and reasonable competency?

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... -i-

AFFIDAVIT OF EMERGENCY ..... -ii-

RULE 29.6 STATEMENT ..... -iii-

TABLE OF AUTHORITIES ..... -iv-
FEDERAL CASES ..... -iv-
CONSTITUTIONAL AND STATUTORY PROVISIONS ..... -vi-
OTHER AUTHORITIES ..... -vi-

OPINIONS BELOW ..... Page 1 of 28

JURISDICTION ..... Page 1 of 28

CONSTITUTIONAL & STATUTORY PROVISIONS Page 1 of 28

STATEMENT OF THE CASE ..... Page 3 of 28

STATEMENT OF RIGHT ..... Page 4 of 28
Q.1 Statement ..... Page 4 of 28
Q.2.Statement ..... Page 20 of 28
Q.3 Statement. ..... Page 21 of 28
Q.4 Statement. ..... Page 22 of 28

REBUTTAL OF FINDINGS BELOW ..... Page 23 of 28

REASONS FOR GRANTING THE PETITION .... Page 23 of 28
I. Court of Last Resort to Decide Issue .... Page 23 of 28
II. Lack of Jurisdiction ..... Page 24 of 28
III. Financial Hardship ..... Page 25 of 28

CONCLUSION ..... Page 27 of 28

VERIFICATION ..... Page 28 of 28

AFFIDAVIT OF EMERGENCY

We, Gerald J. Gesiorski and Dawn S. Gesiorski, being first duly sworn, states on oath that:

1. Respondent, CCB&T, has unjustly hindered the sale and/or refinancing of our properties by providing partial instead of full releases for four (4) properties they have received payoff amounts for, thereby preventing Petitioner from providing free and clear title to purchasers and Financial Lenders;
2. Respondent, CCB&T, has filed a Writ of Revival in the York County Court of Common Pleas, Pennsylvania, October 5, 2001, in the amount of $811,772 against all of Petitioners properties after having received payments totaling $751,647 against said judgment;
3. Petitioners, due to no fault of our own, have reduced all available assets paying monthly payments to maintain the estate, unable to sell any property free and clear, and, are on the verge of financial collapse due to the actions of CCB&T and the seven year delay within the Courts of the Administration of Justice; other immediate remedies are unavailing or impossible; no other Court of Law can decide these issues.

We, Gerald J. Gesiorski and Dawn S. Gesiorski, do hereby affirm under penalty of perjury under 28 U.S.C. § 1746(1), that We have read the foregoing Affidavit of Emergency by Us subscribed, and know the contents thereof, and that the matters and things therein stated as of our own personal knowledge We know to be true, and those therein stated as upon information and belief We believe to be true.

Further Affiant sayeth not.

Respectfully Submitted,

Dated : 4/3/2004 By: Gerald J. Gesiorski

Gerald J. Gesiorski

And Dawn S. Gesiorski

Dawn S. Gesiorski

Subscribed and sworn to before me this 3RD day of APRIL, A.D. 2004.

in the County of York,
the Commonwealth of Pennsylvania. ss.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
John L. Setliman, Notary Public
Conewago Twp., Adams County
My Commission Expires Sept. 19, 2005
Member, Pennsylvania Association of Notaries

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that it has no parent companies or non-wholly owned subsidiaries.

TABLE OF AUTHORITIES
FEDERAL CASES

42 L. Ed. 2d 946 ..... Page 24 of 28

Boom Co. v. Patterson, 98 U.S. 403 (1879) ..... Page 24 of 28

Cohens v. Virginia, 19 U.S. 264, 257 (1821) ..... Page 20 of 28

Connell v. Smiley, 156 U.S. 335 (1895) ..... Page 25 of 28

Consumer Products Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ..... Page 12 of 28

Coppell v. Hall, 74 U.S. 542, 559 (1869) ..... Page 22 of 28

Defiance Water Co. v. Defiance, 191 U.S. 184 (1903) Page 25 of 28

Esposito v. I.N.S., 987 F.2d 108 ..... Page 23 of 28

Evans v. Gore, 253 U.S. 245, 250 ... Page 18 of 28, Page 20 of 28

Federal Deposit Ins. Corp. v. Barness, 484 F.Supp. 1134 ..... Page 11 of 28

Fugitive Slave Law, 1 Blatchf. 635, 644 ..... Page 14 of 28

Gainesville v. Brown-Crummer Invest. Co., 277 U.S. 54 (1928) ..... Page 24 of 28

Hanover National Bank v. Moyses (186 U.S. 181 .... Page 9 of 28

Filhiol v. Maurice, 185 U.S. 108 (1902)) ..... Page 25 of 28

INS v. Chadha, 462 U.S. 919 ..... Page 19 of 28

Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379 (1884) ..... Page 25 of 28

Marbury v. Madison, 5 U.S. 137, 177 (1803) ..... Page 12 of 28, Page 17 of 28, Page 18 of 28

Matson Navigation Co. v. United States, 284 U.S. 352 (1932) ..... Page 25 of 28

McMann v. Richardson, 397 U.S. 759 (1970) ..... Page 22 of 28

Metcalf v. Watertown, 128 U.S. 586 (1888) ..... Page 25 of 28

Miranda v. Arizona, 384 U.S. 436, 491 ..... Page 18 of 28

Montana R. Co. v. Warren, 137 U.S. 348 (1890) ... Page 25 of 28

National Mutual Insurance Co. v. Tidewater Transfer Co. Inc., 337 U.S. 582 ..... Page 18 of 28

Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982) ..... Page 10 of 28

Osborne v. United States, 86 U.S. 577, 813 (1874) ... Page 9 of 28, Page 12 of 28, Page 19 of 28, Page 21 of 28

Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236-37 .. Page 22 of 28

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 Page 20 of 28

Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 101-102 ..... Page 20 of 28

United States Ex Rel. Geisler v. Walters, 510 F. 2d 887, 893 (1975) ..... Page 20 of 28

United States v. Clark, 454 U.S. 555, 560 (1982) ... Page 12 of 28

United States v. Griffin, 303 U.S. 226 (1938) ..... Page 24 of 28

United States v. Woodley, 726 F.2d 1328, 1330, 1331 ..... Page 15 of 28, Page 19 of 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 1254(1) ..... Page 1 of 28

P.L. 98 -353, 98 STAT. 333 ..... Page 10 of 28

Pub.L. No. 98-353, § 101, 98 Stat. 333 ..... Page 2 of 28

Pub.L. No. 98-353, § 151, 98 Stat. 333, 336 ..... Page 2 of 28

Pub.L. No. 98-353, § 157, 98 Stat. 333, 340 ..... Page 2 of 28

Pub.L. No. 98-353, § 158, 98 Stat. 333, 341 ..... Page 3 of 28

Public Law No.: 95-598, 92 STAT. 2549 ..... Page 13 of 28, Page 14 of 28

U.S. Const. Art. III, § 1 ..... Page 1 of 28, Page 11 of 28

U.S. Const. Art. III, § 2 ..... Page 1 of 28, Page 11 of 28

U.S. Const. Art. VI, cl. 2 ..... Page 1 of 28

U.S.C.A. § 1334(a),(b) ..... Page 2 of 28, Page 3 of 28

OTHER AUTHORITIES

1 Story's Commentaries on Equity Jurisprudence § 64 ..... Page 23 of 28

123 Cong. Rec. H35450, Oct. 28, 1977 ..... Page 13 of 28

123 Cong. Rec. H35451, Oct. 28, 1977 ..... Page 8 of 28

123 Cong. Rec. H35456, Oct. 28, 1977 ..... Page 8 of 28

123 Cong. Rec. H35683, Oct. 28, 1977 ..... Page 8 of 28

17 Col. Law Review 523, 536 (1917) ..... Page 6 of 28

17 Minn. L. Rev. 237, 241 (1933) ..... Page 5 of 28, Page 6 of 28

1978U.S.C.C.A.N. 5970 ..... Page 13 of 28

1978U.S.C.C.A.N. 6001 ..... Page 13 of 28

1978U.S.C.C.A.N. 5795, 5796 ..... Page 5 of 28

1978U.S.C.C.A.N. 5991,5992 ..... Page 9 of 28

1978U.S.C.C.A.N. 5965 ..... Page 14 of 28

1978U.S.C.C.A.N. 6014 ..... Page 14 of 28

1984U.S.C.C.A.N. 596 ..... Page 9 of 28, Page 10 of 28

1984U.S.C.C.A.N. 595 ..... Page 10 of 28

83 Cong. Rec. S8725, June 10, 1938 ..... Page 4 of 28

83 Cong. Rec. S8725, Jun. 10, 1938 ..... Page 5 of 28

8B C.J.S. *Bankruptcy* § 811, footnote 47, pp. 557-58 (1963) ..... Page 8 of 28

8B C.J.S. *Bankruptcy* § 811, p. 557 (1963) ..... Page 7 of 28

8B C.J.S. *Bankruptcy* § 811, p. 558 (1963) ..... Page 8 of 28

Black's Law Dict., 6th , p. 1375 ..... Page 12 of 28

Br. Leg. Max., 283-84 ..... Page 22 of 28

Br. Leg. Max., 285 ..... Page 22 of 28

Br. Leg. Max., 93 ..... Page 20 of 28

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess. ..... Page 9 of 28, Page 10 of 28

H.R. Rep. No. 3012, 74th Cong., 2d Sess., 4. ..... Page 9 of 28

H.R. Rep. No. 95-595, 95th Cong., 2d Sess. ..... Page 9 of 28

Jenk. Cent., 139 ..... Page 20 of 28

Lofft's Reports 379 ..... Page 23 of 28

Plow. 355 ..... Page 19 of 28

S. Rep. No. 95-989, at 9, 10 (1978) ..... Page 5 of 28

The Fed., No. 83, (Alexander Hamilton) ..... Page 12 of 28

Trayner's Maxiums, 149 ..... Page 23 of 28

U. S. Daily, Thursday, January 12, 1933, at p. 3 ..... Page 7 of 28

VERIFIED PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (02-4071) (App., infra, 1a-6a) is unreported. The opinion of the District Court (02-cv-1003) (App., infra, 23a-28a) is not reported . No opinion was given by the Bankruptcy Court; Order only (App., infra, 38a).

JURISDICTION

The court of appeals judgment was entered on March 11, 2004. A petition for rehearing was not requested due to the immanent financial collapse of the Petitioners which shall occur due to further delay of the administration of Justice and the irreparable damage which has already occurred; further, the Third Circuit's intimidating communication "information about post-judgment practice" pertaining to "PETITIONS FOR REHEARING" (App., infra, 43a-46a), specifically the prejudicial practice statement "**Petitions for Rehearing en Banc are NOT favored....**" and the Courts withholding of any assistance to Petitioners. The jurisdiction of this Court is invoked under U.S. Const. Art. III, § 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part:"This Constitution, and the Laws of the United States *** shall be the supreme Law of the Land *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
U.S. Const. Art. VI, cl. 2.

The Judicial Clause of the Constitution provides in relevant part: "The **judicial Power of the United States, shall be vested** *** in **such inferior Courts as Congress may from time to time ordain and establish**. **The Judges, both of the supreme and inferior Courts, shall hold their Office during good Behavior,**..."
U.S. Const. Art. III, § 1.

"**The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *** - to Controversies *** - between Citizens of different States;**..."
U.S. Const. Art. III, § 2.

The Bankruptcy Amendments and Federal Judgeship Act of 1984 provides in relevant part:

"§ 1334. Bankruptcy cases and proceedings

'(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.'

'(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.'"

Pub.L. No. 98-353, § 101, 98 Stat. 333, (as amended);

"§ 151. Designation of bankruptcy courts

'In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.'"

Pub.L. No. 98-353, § 151, 98 Stat. 333, 336 (as amended);

"§ 157. Procedures

'(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.'

'(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.'"

Pub.L. No. 98-353, § 157, 98 Stat. 333, 340 (as amended);

"§ 158. Appeals

'(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this

subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.'"
Pub.L. No. 98-353, § 158, 98 Stat. 333, 341 (as amended);

STATEMENT OF THE CASE

To the Honorable, the Supreme Court of the United States:

This is an ongoing **Reorganization** action, **never concluded**, in the Bankruptcy Court for the Middle District of Pennsylvania.

The Petitioners (herein Gesiorskis) have respectfully shown in the Record below the Officers and other representatives of Carroll County Bank & Trust (herein CCB&T), seasoned in business, "materially altered" the Instrument agreed upon May 12, 1992 .D.C.doc. 2, pp.1-6, 10) by executing a Mortgage Note and Mortgage December 23, 1992, which contained two "mutually exclusive", distinct and separate bodies of Law operating simultaneously within one document (that of a "deed of trust" and a "mortgage") thereby creating a judicial impossibility and absurdity in law, void *ab initio*.

CCB&T again "materially altered" the Instrument January 5, 1993 by providing Gesiorskis an Amortization Schedule based on monthly payments **which Gesiorskis relied upon to their detriment**.

CCB&T, having Knowledge of their acts, conspired to conceal their acts bettering their position through clever legal wording, blanket releases and stall tactics preventing the sale of Properties and the nonnegotiable Note to qualified buyers. (D.C.doc. 2).

This discrepancy of the amount actually owed by Gesiorskis to CCB&T, and CCB&T's efforts to conceal their mistake is the cause of the whole incident and heated friction between both Parties by which Gesiorskis have been irreparably damaged.

Gesiorskis sought protection of the Bankruptcy Court from the aggressive acts of CCB&T by filing a "Voluntary" Petition for "Reorganization" (Chapter 11) October 24, 1997 and challenged the accuracy of the exact amount owed to CCB&T as evidenced with the schedules filed in the Bankruptcy Court.

CCB&T continued their Scheme before the Bankruptcy Court and conspired to further conceal their acts by **Creating the Stipulation and Consent Agreements, signing them for both CCB&T and Gesiorskis by direction of Gesiorskis' Counsel** without Gesiorskis full under-standing or authority, directly **in opposition to Gesiorskis'**

abilities, needs and directions, thereby, prejudicing the Bankruptcy Court against Gesiorskis producing the illusion We refused to meet obligations placed before us by the Court. Gesiorskis ONLY had understanding of verbally agreeing to make the "Monthly" Payments.

The accuracy of the amount owed to CCB&T never having been resolved by the Bankruptcy Court, Gesiorskis demanded their Counsel motion the Court for an exact accounting and reinstate the automatic stay while arrangements were made for the final payoff.

Gesiorskis had no understanding of the afore stated acts committed against us before the dismissal of Our Counsel and the filing of Our Complaint in the District Court May 13, 2002.

Gesiorskis are not at this time, nor have ever been adjudged Bankrupt. Every effort made by Gesiorskis to payoff CCB&T has been tainted by CCB&T with interference, misrepresentation and fraud. CCB&T **has received from Gesiorskis payments totaling $751,647 of their $811,772 Confessed Judgment since January 23, 1997**.

STATEMENT OF RIGHT

Q.1. This case raises important vexed questions (*vexata quæstio*) relating to the subject-matter jurisdiction of the Article I Bankruptcy Judge over "**Reorganization**" proceedings which are in fact an "**Equity Proceeding**", not Bankruptcy Proceedings, originating in a cause of action "**where diversity exists between parties**" thereby prejudicing and damaging not only Gesiorskis, but every similar litigant throughout the Nation; further, violating the litigants Constitutional, Substantive and Fundamental Rights to Redress of Grievance, Due Process of Law, and Equal Protection of the Laws before an Article III Judge, as well as violation of Public Policy and Legislative Intent of Public Laws, specifically the Judicial Improvement Act, *et al.*.

Congress in discussions, have well expressed the proper character of Reorganization and its imperative need to be adjudicated by one possessing the Judicial Powers of Article III:

> "That reorganization is an equitable procedure, not one of bankruptcy, was held in the case of (*Lowden v. Northwestern National Bank & Trust Co.* 298 U.S. 160, 1936)."

83 Cong. Rec. S8725, June 10, 1938 (Appellants Brief submitted to the Third Circuit Court May 27, 2003 (herein "App. Br."), p. 23).

Furthermore, "**Reorganization is not bankruptcy**. Mr. Justice Cardozo, in a decision in April 1936, so stated .... The two proceedings are entirely different.... A proceeding to reorganize is not a bankruptcy, though an amendment to the Bankruptcy Act creates and regulates the remedy. * * * It (i.e., sec. 68) governs, if at all, by indirection and analogy according to the circumstances. **The rule to be accepted for the purpose of such a suit is that enforced by courts of equity**, which **differs from the rule in bankruptcy** ...." (emphasis added).

83 Cong. Rec. S8725, Jun. 10, 1938 (App. Br, p. 23).

"Chapter 11 deals with the reorganization of a financially distressed business enterprise, providing for its rehabilitation by adjustment of its debt obligations and equity interests. It should be distinguished from the bankruptcy liquidation under chapter 7 or the adjustment of the debts of an individual with regular income under chapter 13.... A fair and equitable reorganization, as provided in the bill, is literally the last clear chance to conserve for them [, the Public,] values that corporate financial stress or insolvency have placed in jeopardy."

S. Rep. No. 95-989, at 9, 10 (1978), *reprinted in* 1978U.S.C.C.A.N. 5795, 5796. (insertion not in original).

As discussed within Law Reviews of the creation of the remedy having its foundation in Equity proceedings:

"[T]he corporate reorganization as evolved by the court of equity, particularly by the federal court of equity, the birthplace of that administrative device. This consideration of the corporate reorganization in equity seems to call also for at least a brief look at the federal equity receivership generally as a means of administering the affairs of an insolvent or an embarrassed corporation."

17 Minn. L. Rev. 237, 241 (1933).

"'Courts of equity long ago lent their assistance to common law courts to enable particular judgment creditors to reach, through receivers, property beyond the reach of execution.... Thus is illustrated anew the vainness of saying what courts of equity cannot do.' Noyes, J. in Pennsylvania Steel Co. v. New York City Ry. Co., (C.C.A. 2nd Cir. 1912) 198 Fed. 721, 737.

'[T]hat a court of equity has extended its protection to a

defendant which admitted that it was unable to discharge its obligations as they matured,...' Report of Special Committee on Equity Receiverships for 1926-1927, Association of the Bar of the City of New York, Year Book, 1927, 321."

17 Minn. L. Rev. 237, 241-43, note 6 (1933).

"[T]he business now requires the services of a legal umpire to pass upon the controversies of the sometimes warring groups of shareholders and security holders. The umpire is the chancellor. The type of proceeding employed is the receivership in equity, usually a federal receivership.... The federal judge sitting in equity is hampered by no statutory rules save those of the judicial code. (footnote omitted)"

17 Minn. L. Rev. 237, 244 (1933)(incorporated herein by reference).

"The Federal Constitution not only empowers Congress to enact a bankruptcy statute, but also 'to make all laws necessary and proper for carrying into execution such an act'....

The British Parliament, mindful, it may be assumed, of Magna Charta and the Bill of Rights, has enacted laws sanctioned and found workable through almost a half century of unbroken and unquestioned judicial approval. The rule of share and share alike thus established in England is the only just and sensible one....

By a simple amendment of the Bankruptcy Act the British results may be made ours.

A brief statute, attaining such ends, could be formulated. It should vest in reorganization receivers such title as the Bankruptcy Act now confers on trustees, thus obviating the need of ancillary receiverships.... [A]bove all, it should enable a court of equity properly to fulfill one of its greatest functions by enforcing equality on all."

17 Col. Law Review 523, 536 (1917), A New Scheme of Reorganization.

Now we find the Executive Department in full agreement, to extend the authority of the Court to stay actions against a debtor to enable an equitable settlement of his affairs:

"On February 29th last I addressed the Congress on the urgent necessity for revision of the bankruptcy laws, and presented detailed proposals to that end. These proposals were

based upon most searching inquiry into the whole subject which had been undertaken by the Attorney General at my direction....

The proposals to amend the Bankruptcy Act by providing for the relief of debtors who seek the protection of the court for the purpose of readjusting their affairs with their creditors carry no stigma of an adjudication in bankruptcy, and are designed to extend the protection of the court to the debtor and his property, while an opportunity is afforded the debtor and a majority of his creditors to arrange an equitable settlement of his affairs, which upon approval of the court will become binding upon minority creditors....

(Signed) HERBERT HOOVER

The White House, Jan. 11, 1933."

U. S. Daily, Thursday, January 12, 1933, at p. 3.

Petitioner incorporates herein, by reference, the 200 page "Report of the Attorney General on Bankruptcy Law and Practice" found within S. Doc. No. 65, February 24, 1932, in totality.

From the Judicial history of decisions pertaining to Reorganization it is again evidenced the decision making of the court is founded in Equitable process, a process, in this Country, exercised only by one exercising Judicial Power originating from Article III:

"**Reorganization of a corporation in bankruptcy stems from the old reorganization in equity**." (Central States Elec. Corp. v. Austrian, C.A. Va., 183 F.2d 879, certiorari denied 71 S.Ct. 350, 340 U.S. 917, 95 L.Ed. 662, Chase v. Austrian, 71 S.Ct. 350, 340 U.S. 917, 95 L.Ed. 662, Berner v. Austrian, 71 S.Ct. 350, 340 U.S. 917, 95 L.Ed. 662, and Kelley Committee for the Holders of 6% Preferred Stock v. Austrian, 71 S.Ct. 351, 340 U.S. 917, 95 L.Ed. 662.) (emphasis added).

8B C.J.S. *Bankruptcy* § 811, p. 557 (1963).

"As otherwise stated, the underlying purposes of a corporate reorganization are to rehabilitate debtor corporations according to sound business principles, permit them to continue in business, and, at the same time, **protect stockholders and creditors to the full extent of the value of their equities and claims**. (Denver & R. G. W. R. Co. v. Goldman, Sachs & Co.,

C.A.Colo., 212 F.2d 627.) (emphasis added).

8B C.J.S. *Bankruptcy* § 811, p. 558 (1963).

> "'Corporate reorganization' in federal courts is a process of adjustment and modification of legal rights frequently involving impairment of contractual obligations under plan predicated on consent of security holders and creditors and **on court's approval of plan as fair and equitable** and therefore binding on minority. (emphasis added).
>
> N.Y.– Ferris v. Prudence Realization Corp., 54 N.E.2d 367, 292 N.Y. 210, affirmed 65 S.Ct. 539, 323 U.S. 650, 89 L.Ed. 528."

8B C.J.S. *Bankruptcy* § 811, footnote 47, pp. 557-58 (1963).

Such proceedings are judicial in their nature, arising in equity, so that jurisdiction of the subject-matter, which can only be exercised by an Article III Judge, is essential. As recognized by the House, the Bankruptcy Court exercises "pervasive jurisdiction, a jurisdiction to solve all the problems surrounding a bankruptcy estate, and in doing this we are exercising the judicial power which we cannot do except under an article III court, a tenured court under the Constitution." 123 Cong. Rec. H35456, Oct. 28, 1977 (App. Br., p. 14).

> "[W]e want to empower them with authority to handle the bankruptcy business, and **that is why we require that they should be so-called article III judges**, because we cannot have judges who are going to have this kind of authority without their having the constitutional backup, which is required.
>
> The **Attorney General recognizes that**. He has written to the committee and the supporters of this amendment, saying that if we clothe the bankruptcy judges with authority to administer a bankrupt estate, **they have to be article III judges under the Constitution**." (emphasis added).

123 Cong. Rec. H35683, Oct. 28, 1977 (App. Br., pp. 14-15).

> "Thus we have a dilemma of sorts. While there are those of us who would love few things more than to be able to avoid more presidentially appointed judges, **there stands in our way the Constitution and its requirement that the 'judicial power' must be exercised by courts of the United States under article III**." (emphasis added).

123 Cong. Rec. H35451, Oct. 28, 1977 (App. Br., p. 15).

Congress and the Judiciary are bound by the limitations placed upon them by the Constitution and cannot do indirectly that which cannot be done directly:

> "**The judiciary act, nor other law of Congress, can extend the jurisdiction of the federal courts beyond the constitutional limits**." (emphasis added).

Osborne v. United States, 86 U.S. 577, 813 (1874).

In *Hanover National Bank v. Moyses* (186 U.S. 181) "[t]he Supreme Court held that Congress has almost unlimited power over the subject of bankruptcy. (cites omitted)" H.R. Rep. No. 3012, 74th Cong., 2d Sess., 4.

> "[A]s Professor Wechsler has noted, (footnote omitted) the fact that Article I delegates authority to Congress to 'establish ... uniform laws on the subject of bankruptcies throughout the United States' does not without more permit the administration of such laws by federal courts unprotected by the tenure provisions of Article III. The bankruptcy power is no different in this respect than the power to regulate commerce or any other source of national legislation.
>
> Each of the specific powers under which a non tenured tribunal has been upheld is of a different nature than Congress' power to legislate with respect to bankruptcy, which does not involve the government. The 'more' to which Professor Wechsler refers is, in each of those cases, a specially recognized relationship between the government and others, or a grant of plenary, non federal power. The other enumerated powers, bankruptcy included, are Federal in nature, and thus constrained by the requirements of federalism."

H.R. Rep. No. 95-595, 95th Cong., 2d Sess., 1978U.S.C.C.A.N. 5991,5992 (App. Br., p. 13).

Although the question was again realized in House Conference, it has not been settled by the Supreme Court:

> "In Marathon, the Supreme Court decided the bankruptcy judges could not adjudicate State law claims."

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 1984U.S.C.C.A.N. 596 (Appellants Reply Brief submitted to the Third Circuit July 9, 2003, herein App. R. Br., p. 24).

"Thus, the provisions allowing any case 'related to' bankruptcy to be adjudicated in Federal court violates article III."

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 1984U.S.C.C.A.N. 595. (App. R. Br., p. 24).

"Cases based solely on State law cannot be adjudicated in any Federal court where there is no diversity and where the only Federal connection is that one of the parties is a chapter 11 debtor."

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 1984U.S.C.C.A.N. 595. (App. R. Br., p. 24).

"Mandatory abstention would essentially restore the way the system functioned successfully for decades prior to the unconstitutionally broad 'related to' jurisdiction in 1978."

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 1984U.S.C.C.A.N. 596 (App. R. Br., pp. 24-25).

"**[U]nless the district court has some independent basis for article III jurisdiction – diversity – will create constitutional problems as great as the problem solved by the amendments**" (emphasis added).

H. Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 1984U.S.C.C.A.N. 596 (App. R. Br., p. 25).

P.L. 98 -353, 98 STAT. 333, did nothing more than fix the Constitutional issue addressed specifically in *Northern Pipeline Const. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982). Claims grounded purely in State law not "arising under" Federal law and diversity prohibits bankruptcy judges, who lack life tenure, from adjudicating the case in Federal courts. (App. R. Br., p. 25).

Congress addressed the issue the Supreme Court Raised , and only that. **This is not the issue Gesiorskis have raised**.

Diversity exists between Carroll County Bank & Trust n/k/a Branch Banking & Trust, a State Bank located in the State of Maryland and Gesiorskis, Citizens of the Commonwealth of Pennsylvania, residing therein; this is not in question.

Further, Gesiorskis have, in effect, **stood on a table top during the ongoing Bankruptcy proceedings**, screamed at the top of our voice appealing to the District Court's jurisdiction as evidenced within the **Original 22 page Document** initiated within the District Court

May 13, 2002, styled as an Appeal, filed with the **52 page Memorandum in Support** including **more than 500 exhibits of Evidence**, and the **Amended 34 page Document** filed June 3, 2002, **containing various issues**, further **supported by Appellants' Brief** (D.C.doc.46) signed under penalty of perjury sufficient to meet the required form of an Affidavit (*Federal Deposit Ins. Corp. v. Barness*, 484 F.Supp. 1134) **seeking damages!**

Article III, Section. 1. states:

> "The **judicial Power of the United States, shall be vested in** one supreme Court, and in **such inferior Courts as Congress may from time to time ordain and establish**. **The Judges, both of the supreme and inferior Courts, shall hold their Office during good Behavior**, and shall, at stated times, receive for their Services, a Compensation, which shall not be diminished during the Continuance in Office."

U.S. Const. Art. III, § 1. (emphasis added).

The individuals who enter therein to act as Judges, and to exercise vested Judicial Powers and Authority of the United States, are therefore subject to the Specific Performance as Mandated therein which shall meet the specifications required by Article III .

As stated in Article III, Section. 2.:

> "**The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States**, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public ministers and Cousuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - **to Controversies** between two or more States; - between a State and the Citizens of another State; - **between Citizens of different States**; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects."

U.S. Const. Art. III, § 2. (emphasis added).

The word "shall" is unambiguous on its face and is mandatory language. It is fundamental that when the actual language of a statute is clear, it is ordinarily conclusive. *United States v. Clark*, 454 U.S. 555, 560 (1982); *Consumer Products Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

> **Shall.** As used in statutes, contracts, or the like, this word is generally **imperative** or **mandatory**. In common or ordinary parlance, and in its ordinary signification, the term "shall" is **a word of command**, and one which **has always** or **which must be** given a **compulsory meaning**; as denoting **obligation**."

Black's Law Dict., 6th , p. 1375 (emphasis added).

The Constitution has declared specific limits beyond which the federal Courts cannot extend their jurisdiction, these same limits cannot, by Acts of Congress, be granted, for any reason or period of time, to those not within the jurisdiction of the Judiciary, that originating from Article III:

> "The judicial authority of the federal judicature is declared by the Constitution to comprehend certain cases particularly specified. These expressions mark the precise limits beyond which the federal courts cannot extend their Jurisdiction, because the object of their cognizance being enumerated, the specifications would be nugatory if it did not exclude all ideas of more extensive authority."

The Fed., No. 83, (Alexander Hamilton).

> "Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislation, repugnant to the constitution, is void."

Marbury v. Madison, 5 U.S. 137, 177 (1803).

> "In fact, a general power to bring actions in the courts of the United States, is so peculiarly and explicitly personal on the face of the constitution, that it is hard to perceive how Congress could have for a moment lost sight of the restrictions imposed, in this respect, upon the judicial power.... [T]hough I will still dispute the principle, that a repetition of error can convert an act into law or truth."

Osborne v. United States, 86 U.S. 577, 899-900, 902 (1874).

As admitted, "[t]he Bankruptcy Rules, adopted in 1973, have modified appellate procedure to bring it more into line with actual practice in the bankruptcy and district courts. The Rules provide for an appeal from a judgment or order of a bankruptcy judge to the district court, rather than a review. This change, with others **provided for by the Rules**, have made the bankruptcy judge more of a trial judge. The **district court has become** an appellate tribunal, **in name as well as in fact**, whose task is to affirm, modify, or reverse a bankruptcy judge's judgment or order, or remand with instructions for further proceedings." (emphasis added) Public Law No.: 95-598, 92 STAT. 2549; 1978 U.S.C.C.A.N. 6001 (App. Br., pp. 24-25).

> "[U]nless you elevate the status of [] the judges to the quality of the problems that are before them, then you are going to get second-rate judges; you are going to get second-rate solutions to problems; and you are going to get second-rate justice."

123 Cong. Rec. H35450, Oct. 28, 1977 (App. Br., p. 25).

> "**The thrust of the Bankruptcy Rules, more than any change** in the preceding 40 years, **was to recognize the judicial character of the office** of bankruptcy judge,... In the words of the Judicial Conference's Advisory Committee on Bankruptcy Rules:
>
> > **[t]here has been a purpose** to emphasize the judicial in contradistinction to the ministerial functions of the referee in bankruptcy administration and **to enhance the dignity of the office** as that of the principal judge of the bankruptcy court.
>
> **The result** of these developments **in law** has been **to recognize** the bankruptcy judge **as a regular judicial official** that handles only bankruptcy cases. Thus, bankruptcy judges today **comprise a de facto specialized court system** within the district courts." (emphasis added).

Public Law No.: 95-598, 92 STAT. 2549; 1978 U.S.C.C.A.N. 5970 (App. Br., p. 25).

> "Why are we here at all today?
>
> The most serious problem is the court system itself. It [, the Bankruptcy Court,] is not a real court." (Insertion mine)

123 Cong. Rec. H35450, Oct. 28, 1977 (App. Br., p. 26).

"It is not independent. It must operate under the supervision of an unconcerned district court."

Public Law No.: 95-598, 92 STAT. 2549; 1978U.S.C.C.A.N.5965 (App. Br., p. 26).

"The rights of litigants, both debtors and creditors, **to a full constitutional court must also be considered**. This is not (footnote omitted)

a problem of a 'highly theoretical nature.' Far from being 'theoretical' it is intensely practical, for it deals with powers of judges ... over vast property interests in complicated trials customarily involving the right to trial by jury.

With billions of dollars and hundreds of thousands of debtors and creditors moving through the bankruptcy courts annually, **the court system should be no less than that provided other litigants in the Federal system**."

Public Law No.: 95-598, 92 STAT. 2549; 1978U.S.C.C.A.N.6014 (App. Br., p. 26). (emphasis added).

"Judicial Power", that is Article III Power, is vested in the Judges charged with the declaration of what the law is and its construction so far as it is written law, derived from the Constitution for the United States of America, and no other:

"[T]he power conferred upon Courts ordained and established by and under the Constitution, in the strict and appropriate sense of that term—Courts that compose one of the three great departments of the government prescribed by the fundamental law, the same as the other two, the legislative and the executive. But, besides this mass of judicial power belonging to the established Courts of a government, **there is no inconsiderable portion of power, in its nature judicial—*quasi* judicial—invested**, from time to time, **by legislative authority**, in individuals, separately or collectively, **for a particular purpose** and **limited time**." (emphasis added).

Fugitive Slave Law, 1 Blatchf. 635, 644.

"Article III states explicitly and unambiguously that the judicial power is to be exercised by those holding 'their Offices during good Behavior and ... at stated Times, receiv[ing] for their Services, a Compensation, which shall not be diminished during their Continuance in Office.'U.S.Const. art. III, § 1....

We cannot disregard such an explicit constitutional requirement, for

> when the Constitution ... gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because 'it is a *constitution* we are expounding,' *M'Culloch v. Maryland*, 4 Wheat. 316, 407 [4 L.Ed. 579], we ought not to take liberties with it.

Id. at 646-47, 69 S.Ct. at 1196. Only an even more explicit constitutional provision could justify disregard of article III's command that the judicial power shall be exercised only by those enjoying article III protection."

United States v. Woodley, 726 F.2d 1328, 1330, 1331.

"To what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the later part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable....

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its validity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to

be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is ....

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the constitution, **and the constitution is superior to any ordinary act of the legislature, the constitution**, and not such ordinary act, **must govern the case to which they both apply**.

Those, then, **who controvert the principle that the constitution is to be considered, in court, as a paramount law**, are reduced to the necessity of maintaining that courts must **close their eyes on the constitution**, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction....

[M]ust the constitutional principle yield to the legislative act?

[I]t is apparent, that **the framers of the constitution**

contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, for violating what they swear to support!...

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and can not be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that **in declaring what shall be the supreme law of the land**, the constitution itself is **first mentioned**; and not the laws of the United States generally, but those **only which shall be made in pursuance of the constitution**, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, **that a law repugnant to the constitution is void**; and that **courts, as well as other departments, are bound by that instrument**."

Marbury v. Madison, 5 U.S. 137, 176-80 (1803). (emphasis added).

"No provisions of the Constitution,... are more explicit and specific than those pertaining to the courts established under Article 3.... The precision which characterizes these portions of Article 3 is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treatment. Great concepts like 'Commerce . . . among the several States,' 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society

remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because 'it is *a constitution* we are expounding,' M'Culloch v. Maryland, 4 Wheat (US) 316, 407, 4 L ed 579, 601, we ought not to take liberties with it."

National Mutual Insurance Co. v. Tidewater Transfer Co. Inc., 337 U.S. 582, Frankfurter, J. Dissenting. (App. Br., pp. 13-14).

"It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.

Marbury v. Madison, 5 U.S. 137, 174 (1803).

"'Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.'"

Evans v. Gore, 253 U.S. 245, 250. (App. Br., p. 14).

When a "Citizen's" Constitutional Rights are involved, only Courts established under provisions of Art. III and Judges possessing proper Character and Capacity Mandated by Art. III, are empowered to adjudicate matters of Constitutional merit or import:

"Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them."

Miranda v. Arizona, 384 U.S. 436, 491. (App. Br., p. 29).

"Early Supreme Court authority suggested that great weight was to be given to historical practice.... The view that a long and continuous practice is entitled to a presumption of constitutionality gained further currency in the early part of th[at] century.... This early line of Supreme Court authority, holding that unchallenged historical practice is sufficient evidence of constitutionality, no longer, however, represents the thinking of the Court. Recent Supreme Court discussions of the issue indicate that any practice, no matter how fully accepted or efficient, is 'subject to the demands of the Constitution which defines powers and ... sets out just how those powers are to be

exercised.'(cites omitted)... The Court stated that, regardless of historical practice, 'policy arguments supporting even useful 'political inventions' **are subject to the demands of the Constitution which defines powers and,... sets out just how those powers are to be exercised**.'... The teaching of Chadha is clear. Historical acceptance and governmental efficiency are not unimportant. They will not, however, 'save [a practice] if it is contrary to the Constitution.'... A practice condemned by the Constitution cannot be saved by historical acceptance and present convenience." (footnote omitted) (emphasis added) (insertion in original).

United States v. Woodley, 726 F.2d 1328, 1337; quoting in quotations *INS v. Chadha*, 462 U.S. 919.

"*Actus repugnans non potest in esse produci.*"

A repugnant act cannot be brought into being (*i.e.* cannot be made effectual).

Plow. 355.

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it."

Osborne v. United States, 86 U.S. 577, 866 (1874).

The Bankruptcy Judge, receiving authority which arises from Article I of the Constitution cannot exercise the Judicial Power originating from Article III to adjudicate a Reorganization proceeding, which requires decisions exercised by Courts of Equity arising under this Constitution, the laws of the United States, applicable to Controversies between Citizens of different States; that Judge acts ultra vires rendering any determination and judgment in that cause of action void and in violation of Constitutional, Substantive and Legislative Rights of litigants to Redress of Grievance, Due Process of Law, and Equal Protection of the Laws before an Article III Judge, as well as violation of Public Policy:

To a judge who exceeds his office (or jurisdiction) no obedience is due."*Judici officium suum excedenti non paretur*".

Jenk. Cent., 139.

"For a court to pronounce upon [the merits] when it has no jurisdiction to do so, is ... for a court to act ultra vires." *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 101-102; distinguished in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583.

"*Judicium a non suo judice datum nullius est momenti.*"

A judgment given by an improper judge is of no moment. Br. Leg. Max., 93.

This question is one this Honorable Court is obligated by duty to address and decide; you cannot pass it by:

> "The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them."(emphasis added).

Cohens v. Virginia, 19 U.S. 264, 257 (1821).

> "[D]oing what the Constitution permits gives no license to do what it prohibits."

Evans v. Gore, 253 U.S. 245, 255.

Q.2. The District Court, being the Court of original jurisdiction, erred "wherein the court shall look to the substance of the complaint rather than the form" by refusing to expand the Record, and, fairly air and address each issue raised before that Court contained within the pleadings **submitted with substance of a complaint** May 13, 2002, creating an **impossibility** for that Court **to reach correct findings of fact or conclusions of law**. The Third Circuit, relying on the lower court decision, cannot be correct in their decision having refused to expand the Record and fairly air each issue raised before them.

> "We hesitate to repeat the ancient statement that justice delayed is justice denied,..."

United States Ex Rel. Geisler v. Walters, 510 F. 2d 887, 893 (1975).

> "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice."

O'Neill v. United States, 411 F.2d 139, 144 (3d Cir. 1969).

"Discussion.

We begin by noting the procedural posture of this case. This is an appeal from the May 3, 2002, order of the bankruptcy court denying Appellants' motion to reinstate the automatic stay and for an accounting. In that motion, Appellants argued the stay should be reimposed only by disputing the amount due on the loan and by asserting they were thus entitled to an accounting before a sheriff's sale of their residence was allowed. Thus, the only matter before us as an appellate court is the validity of the bankruptcy court's decision not to reinstate the stay in the face of the contrary reasons Appellants presented to the bankruptcy court. "As a general rule, a court should refuse to consider an issue that is raised for the first time on appeal." *Hutchins v. Commonwealth Mortgage Corp.*, 165 B.R. 401, 402 (E.D. Pa. 1994).

We therefore decline Appellants' invitation that we withdraw the reference to the bankruptcy court and use our jurisdiction over bankruptcy cases, *see* 28 U.S.C. § 157, to entertain new grounds not presented to the bankruptcy court or new claims for affirmative relief. We see no reason why this case should not follow the ordinary rules of bankruptcy procedure **although we express no opinion on whether any of the new claims could not be presented in another forum**."

(App., infra, 23a-28a). (emphasis added).

"**No one can question that the court which has jurisdiction of the principal question, must exercise jurisdiction over every question**." (emphasis added).

Osborne v. United States, 86 U.S. 577, 884 (1874).

Q.3. The District Court Should have found the Mortgage Note to be void, tainted with the contamination of the originating acts of the Officers of CCB&T. The instrument contained two mutually exclusive forms, that being a "Deed of Trust" and a "Mortgage" which is an impossibility in law; further, the Officers altered the instrument. *ex dolo malo non oritur actio*. [A]n action cannot be maintained which is founded in fraud, or which springs *ex turpi causâ*.

"Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case.

No consent ... can neutralize its effect. A stipulation in the most solemn form to waive the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation. (cites omitted)"

Coppell v. Hall, 74 U.S. 542, 559 (1869).

"[T]he principal transaction was invalid on the ground of fraud, according to the principle that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it; *nul prendra advantage de son tort demesne*.

Br. Leg. Max., 285.

"[T]he author of wrong, who has put a person in a position in which he had no right to put him, shall not avail himself of his own wrong."

Br. Leg. Max., 283-84.

"Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.'... [S]pecific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity,..."

Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236-37.

Q.4. The District Court executed fundamental error **by not conducting a hearing** (App., infra, pp. 23a-28a), **wholly rejecting Appellants position** that our Attorney acted without authority and in collusion with CCB&T withholding Knowledge, and by suggestive belief that the Bankruptcy Court would remedy the abuses of a totality tainted trial, judgment and appeal which has subjected us to almost Seven years of trying to pay CCB&T its claimed debt only to find Counsels have Conspired to prevent us from doing so at every attempt.

The Third Circuit has taken the position that effective representation is to be judged by a standard of normal and reasonable competency as suggested in *McMann v. Richardson*, 397 U.S. 759 (1970). The Reviewing Court uses its own judgment as to whether

counsel was effective. *Esposito v. I.N.S.*, 987 F.2d 108. This inaction to expand the Record and examine the acts of Petitioners Attorney has denied us our Right to due process of law and equal protection.

Further, the Third Circuit violated their own position of judging if counsel provided effective representation by a standard of normal and reasonable competency in this instant case.

"The laws help persons who are deceived, not those deceiving." Trayner's Maxiums, 149.

"Equity never contradicts the Law." Lofft's Reports 379.

"Equity follows the law." 1 Story's Commentaries on Equity Jurisprudence § 64.

REBUTTAL OF FINDINGS BELOW

Both the District Court and the Circuit Court of Appeals refused to Expand the Record (App., infra, pp. 10a-33a) to allow Newly Discovered Evidence to be aired to prove Gesiorskis Claims. Without those facts having been considered by the lower Courts it is impossible to have reached accurate findings of fact and conclusions of law.

If in fact the Bankruptcy Article I Judge was without jurisdiction to preside over Reorganization (Equity) proceedings, the District Court is the proper forum to raise the issues Gesiorskis have raised and addressed. The judgment of the District Court resulted from a mistake of law, and its proper application. The Bankruptcy Article I Judges judgments are without moment and void. The Circuit Court of Appeals affirmed the lower Courts decisions which were incorrect.

REASONS FOR GRANTING THE PETITION

I. **Most importantly**, this is the Court of last resort. Petitioners have been denied any assistance by the inferior Courts. **We face eminent financial collapse, substantial injury and prejudice caused by the delay of the administration of Justice where other remedies are unavailing or impossible if this Honorable Court denies our Petition**.

The passing of this vexed question below, which affects not only Gesiorskis' Rights, but the Rights of every litigant with the afore stated voluntary petition for reorganization where diversity exists now before a Bankruptcy Article I Judge, has unjustly taken time from our

lives causing unusual hardship in an effort to receive Justice; time, unjustly taken, is property, and in fact, the unjust taking of our property in violation of the Constitution.

II. **Secondly**, This Honorable Court has considered issues or questions, although these questions were not, or not properly, raised by the parties in the courts below (42 L. Ed. 2d 946). And further, understanding that objections to the jurisdiction of a federal court below, when they go to the subject-matter of the controversy and not the form merely of its presentation or to the character of the relief prayed, may be taken at any time; and that such objections are not waived because they were not made in the lower court (*Boom Co. v. Patterson*, 98 U.S. 403 (1879); *Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54 (1928); *United States v. Griffin*, 303 U.S. 226 (1938)), Petitioners have consistently raised these issues without success.

Although Petitioners may have failed to properly raise the issue within the District Court; the issue was raised sufficiently enough to have the District Court state:

> "We begin by noting the procedural posture of this case. This is an appeal from the May 3, 2002, order of the bankruptcy court denying Appellants' motion to reinstate the automatic stay and for an accounting.... Thus, the only matter before us as an appellate court is the validity of the bankruptcy court's decision not to reinstate the stay in the face of the contrary reasons Appellants presented to the bankruptcy court. "As a general rule, a court should refuse to consider an issue that is raised for the first time on appeal." *Hutchins v. Commonwealth Mortgage Corp.*, 165 B.R. 401, 402 (E.D. Pa. 1994).
>
> **We therefore decline Appellants' invitation that we withdraw the reference to the bankruptcy court and use our jurisdiction over bankruptcy cases**, *see* 28 U.S.C. § 157, to entertain new grounds not presented to the bankruptcy court or new claims for affirmative relief. We see no reason why this case should not follow the ordinary rules of bankruptcy procedure **although we express no opinion on whether any of the new claims could not be presented in another forum**." (App, infra., 23a-28a). (emphasis added).

There is **no other proper forum** to which we can go **due to diversity** between Gesiorski and CCB&T **involved in an ongoing Reorganization never being concluded**, which can provide adequate remedy. If the trial court – in the instant case **a court of Bankruptcy which an Article I Judge presides over – had no jurisdiction**, that is a matter which **is always open**, and the attention of the court of last resort may be called thereto in the first instance (*Montana R. Co. v. Warren*, 137 U.S. 348 (1890)), even if the court below disposed of the case on the merits (*Filhiol v. Maurice*, 185 U.S. 108 (1902)).

Petitioners again raised the issue unsuccessfully within the Circuit Court of Appeals for the Third Circuit contained within the Brief of Appellants, pp. 11-29 and Appellants Reply Brief, pp. 24-26.

Whether the Bankruptcy Court below, which an Article I Judge presides over, had or did not have jurisdiction is a question which the United States Supreme Court must examine and determine, even if the parties forbear to raise it, or consent that the case be considered upon its merits (*Metcalf v. Watertown*, 128 U.S. 586 (1888); *Defiance Water Co. v. Defiance*, 191 U.S. 184 (1903); *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932)).

On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of the United States Supreme Court, and then of the court from which the record comes; and if the record discloses that the lower court was without jurisdiction, the Supreme Court will notice the defect, and this question the Supreme Court is bound to ask and answer for itself, without respect to the relation of the parties to it (*Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379 (1884); *Connell v. Smiley*, 156 U.S. 335 (1895)).

This Court is obligated by duty to declare the Law of the Constitution as meant to be. *When foundation fails, all fails.*

III. **Finally**, Respondent is attempting to foreclose on our Residence in the York County Court of Common Pleas and **extort legal fees in the amount of $101,880.61 based on fifteen percent (15%)** of the amount contained within the Confession of Judgment. Pennsylvania **Act 6 precludes an action of foreclosure against a residential property by confession of judgment**; instead an original action of Mortgage Foreclosure must be commenced. **The Mortgage only allows five percent (5%) of the unpaid balance** at time of foreclosure

for Attorney fees. Respondent, even after the afore stated fact was brought to their attention, **has filed a Writ of Revival in the York County Court of Common Pleas in the original amount of the Confessed Judgment for $811,772.45, which included the 15% collection fee of $101,880.61, for taking a confessed judgment., which Respondent is not entitled to by law or contract**.

Respondent has **Clouded the Title** of **each** and **every Property** of Gesiorskis, **even after having received Agreed to Payoff Amounts** thereby **preventing us from Selling anything** being able to **provide Clear Title to Purchaser**.

Respondent **has been paid $71,156.65** for the 276 Locust Street Property on November 2, 1998, **in exchange for FULL and COMPLETE RELEASES of said Property**, instead, CCB&T only **provided a Partial Release** thereby preventing Gesiorskis from Selling and/or Refinancing the 276 Locust Street Property with Free and Clear Title.

Respondent has further received $60,000.00 for the 502 Meade Avenue Property on October 25, 1999, **in exchange for a FULL and COMPLETE RELEASE of said Property**, again instead, CCB&T **provided only a Partial Release** thereby preventing Gesiorskis from Selling and/or Refinancing the 502 Meade Avenue Property with Free and Clear Title.

Respondent has again received $250,000.00 for the 20 McKinley Avenue Property on March 4, 1999, **in exchange for a FULL and COMPLETE RELEASE of said Property**, and again, instead, CCB&T **provided only a Partial Release** once again preventing Gesiorskis from Selling and/or Refinancing the 20 McKinley Avenue Property with Free and Clear Title.

Respondent verbally agreed to the unconditional release the **34 Frederick Street Property** for the lump sum payment of **$148,250.00** received on December 27, 2001, but again **willfully misrepresented their true intent** and **denied Free and Clear Title**.

In view of the Public interest concern and the importance of the questions involved, the interest of Justice, and the hardship which will result due to other remedies not being available or are impossible to obtain, a speedy and final determination of these questions should be taken into consideration.

CONCLUSION

Petitioner, being unschooled in Law, Moves this Honorable Court to see this instant Writ for Certiorari as Perfect in form in the eyes of the Court. To take Judicial Notice of any term, technical or other, Petitioner has used or failed to use, which would cause defect in this instant Writ, and for this Honorable Court to import that which is correct in the eyes of the Court. At a minimum, to Grant this instant Writ with said imperfections allowing Petitioner opportunity to amend as noticed by this Court without delay of relief Prayed for.

This is the Eleventh Hour for us. We have stood for what is Just, Honest and Right. In the interest of Justice, for this Honorable Court to fail to protect the Rights of the Petitioner by withholding the administration of Justice, not only will you have failed to protect the Rights of other litigants throughout the Nation, you will have failed to protect your own. To allow another Mans Rights to be reduced, you have in fact reduced your own. We have no other immediate remedy available to us. This Court is the only Court able to decide the issues.

WHEREFORE, in the interest of Justice, Petitioners Pray this Honorable Court:

1. GRANT this instant Writ for Certiorari without delay;

2. ORDER immediate stay of foreclosure proceeding against Gesiorskis' Residence in York County Court of Common Pleas, Pennsylvania, and any other actions by the inferior Courts until a decision has been reached by this Honorable Court;

3. ORDER CCB&T to immediately Prepare and **Record FULL** and **COMPLETE RELEASES** for the **276 Locust Street** Property, the **502 Meade Avenue** Property, the **20 McKinley Avenue** Property and the **34 Frederick Street** Property which CCB&T **has received payment for**, and to **Remove any and all references** to **Gesiorskis** and "**lil bit of Chicago, Inc.**" as being in debt to CCB&T from the **Records of York County** for afore stated Properties to allow the **immediate Sale and/or Refinance** of said Properties; which, if this Honorable Court so states, all proceeds, if any, will be escrowed with this Court;

4. Consider questions passed upon by the courts below, although not, or not properly, raised by Petitioner; notice plain or fundamental error appearing on the record, although no question in that respect was raised or properly raised by Petitioners; grant trial de novo for issues addressed; and grant such other and further relief as is deemed just and necessary;

IN THE ALTERNATIVE, if Petitioners have erred in form, Petitioners Pray for directions to amend or for other appropriate writ to issue without delay of other relief Prayed for.

VERIFICATION

We, Gerald J. Gesiorski and Dawn S. Gesiorski, do hereby verify under penalty of perjury under 28 U.S.C. § 1746(1), that the foregoing statements are true and correct, and this petition is made in good faith, is not frivolous, and is not interposed for the purpose of delay.

Respectfully Submitted, *in propria persona*

Dated: 4/3/2004 By: Gerald J. Gesiorski

Gerald J. Gesiorski

And Dawn S. Gesiorski

Dawn S. Gesiorski
c/o 20 McKinley Avenue
Hanover, Pennsylvania 17331
(717) 632-9515

ACKNOWLEDGMENT

On this day before me, the undersigned authority, personally appeared Gerald J. Gesiorski and Dawn S. Gesiorski, known to me whose names are subscribed to the foregoing instrument titled VERIFIED EMERGENCY PETITION FOR WRIT OF CERTIORARI and who have acknowledged to me that they executed the same for the purposes therein expressed, in the capacity therein stated, and that the execution of the instrument was their free act and deed.

Given under my hand and seal this 3RD day of April, 2004.

NOTARY PUBLIC, In and For the Commonwealth of Pennsylvania
My Commission Expires:

COMMONWEALTH OF PENNSYLVAN
NOTARIAL SEAL
John L. Sellman, Notary Public
Conewago Twp., Adams County
My Commission Expires Sept. 19, 200
Member, Pennsylvania Association of Nota

APPENDICES

			Page No.
A.	Third Circuit Denial of Appeal	(03/11/04)	1-a
B.	Third Circuit Opinion, Per Curiam	(03/11/04)	3-a
C.	Third Circuit Denial of Mtn. for Stay	(05/16/03)	7-a
D.	Third Circuit Denial to Expand the Record Pursuant to F.R.A.P. 10(e) for Good Cause; Denial to Expand the Record Pursuant to F.R.A.P. 10 (c) for Good Cause	(02/24/03)	10-a
E.	Third Circuit Denial of Motion to Expedite Appeal	(12/23/02)	11-a
F.	Third Circuit Review of Addendum	(08/01/03)	12-a
G.	District Court Denial to Expand Record to be sent to the Third Circuit for Review	(03/31/03)	13-a
H.	Third Circuit Grant to Proceed on Original Record of District Court	(12/31/20)	17-a
I.	District Court Affirming Final Order	(12/06/02)	18-a
J.	District Court Denial of Stay	(12/06/02)	19-a
K.	District Court Striking Exhibits- B, C, D, E, F, G, H, I, J, K, L, M, N, O, P	(10/25/02)	22-a
L.	District Court Memorandum of Denial of Gesiorskis Cause of Action	(10/25/02)	23-a
M.	District Court Denial to Strike Appellee's Motion and Supporting Documents	(09/06/02)	29-a
N.	District Court Grant to Strike Request for New Trial	(09/06/02)	30-a

O.	District Court Order Striking Items S4, D1-D179, P1-P13, M1-M23, C1-C14, K1-K5, F1-F27, V1-V3, and L1.	(09/06/02)	31-a
P.	District Court Denial of Stay	(07/29/02)	34-a
Q.	District Court Denial of filing Supporting Brief; Grant of No Appendix	(07/29/02)	36-a
R.	District Court Denial of Appellee to Remand Back to Bankruptcy Court to File Designation of Record	(07/29/02)	37-a
S.	Bankruptcy Court Denial to Reinstate Automatic Stay and to Compel Accounting of Commercial Account	(05/03/02)	38-a
T.	Motion To Reinstate Automatic Stay And To Compel An Accounting Of Debtors-In-Possession's Commercial Mortgage Account	(02/15/02)	39-a
U.	Third Circuit NOTICE OF JUDGMENT and information of post-judgment practice	(03/11/04)	43-a

A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-4071

IN RE:
GERALD J. GESIORSKI;
DAWN S. GESIORSKI,

Debtors

GERALD J. GESIORSKI;
DAWN S. GESIORSKI,

Appellants

v.

BRANCH BANKING & TRUST CO.,
f/k/a Carroll County Bank &
Trust

On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 02-cv-01003)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
November 5, 2003

Before: ROTH, RENDELL AND FUENTES, CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34,1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on October 25, 2002 be, and the same is, hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron

Clerk

DATED: March 11, 2004

B.

UNREPORTED- NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-4071

IN RE:
GERALD J. GESIORSKI;
DAWN S. GESIORSKI,

Debtors

GERALD J. GESIORSKI;
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For the Middle District of Pennsylvania
(D.C. Civ. No. 02-cv-01003)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
November 5, 2003

Before: ROTH, RENDELL AND FUENTES, CIRCUIT JUDGES
(Filed March 11, 2004)

OPINION

PER CURIAM

Appellants Gerald and Dawn Gesiorski appeal from an order entered by the United States District Court for the Middle District of Pennsylvania affirming an order of the Bankruptcy Court denying the Gesiorskis' motion to reinstate the automatic stay and to compel an accounting. We have jurisdiction under 28 U.S.C § 158(d). For the reasons that follow, we will affirm.

In December 1992, the Gesiorskis borrowed $735,000 from Carroll County Bank and Trust, mortgaging four commercial properties and their residence. The Gesiorskis failed to make timely payments on their mortgage and, in July 1997, Branch Banking and Trust Company ("BB&T"), successor in interest to Carroll County Bank and Trust, obtained a judgment by confession in the amount of $811,722.45. Shortly thereafter, the Gesiorskis filed a voluntary petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Pennsylvania. The filing of the petition triggered the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362.

In January 1998, BB&T filed a proof of claim based on the confessed judgment. In May 1998, the Gesiorskis and BB&T agreed to a stipulation and consent order. The automatic stay would be lifted and the BB&T would not foreclose on the Gesiorskis' properties as long as certain payments were made. If the Gesiorskis failed to make the required payments, BB&T was entitled to pursue its rights under Pennsylvania law to foreclose on the properties or sell them without further order of the court.

Six amended stipulation and consent orders followed. Each stipulation indicated that it came about because the Gesiorskis had defaulted on their payments under the previous stipulation. Each successive stipulation also permitted BB&T to foreclose or sell the Gesiorskis' properties if the Gesiorskis failed to make their scheduled payments. The Gesiorskis personally signed the first stipulation and the fourth amended stipulation, and their lawyers signed each one.

After the Gesiorskis defaulted on their obligations under the sixth amended stipulation, BB&T indicated that it was going to foreclose on the Gesiorskis' residence. The Gesiorskis responded by

filing a motion in the Bankruptcy Court to reinstate the automatic stay and to compel an accounting of the mortgage account. The Bankruptcy Court denied the motion by order May 3, 2002. The Gesiorskis appealed to the District Court. By order entered October 25, 2002, the District Court affirmed the Bankruptcy Court's order. In that same order, the District Court granted a motion filed by BB&T to strike items from the Gesiorskis' appendix and denied a motion filed by the Gesiorskis to deny BB&T's motion to strike. The Gesiorskis filed a timely appeal.

Essentially, to prevent foreclosure on their property, the Gesiorskis filed a motion in the Bankruptcy Court to reinstate the automatic stay and to compel an accounting of their mortgage account. The stay had been lifted pursuant to seven stipulations and consent orders. The Gesiorskis claimed that the stay should be reinstated because a dispute had arisen regarding the actual amount owed to BB&T on the mortgage.

We conclude that the Bankruptcy Court did not abuse its discretion in denying the motion to reinstate the automatic stay and to compel an accounting. See In re Gledhill, 76 F.3d 1070, 1081 (10th Cir. 1996)(construing motion to reinstate an automatic stay as a Rule 60(b) motion and reviewing the bankruptcy court's order for abuse of discretion). According to the Gesiorskis, the Bankruptcy Judge relied upon the sixth amended stipulation to deny their motion. See Appellants' Reply Br. at 4. Valid stipulations, which have been entered into freely and fairly, and which have been approved by the court, should not be lightly set aside. See Waldorf v. Shuta, 142 F.3d 601, 616 (3d Cir. 1998)(citations omitted). Pursuant to the terms of the sixth amended stipulation, the Gesiorskis consented to the lifting of the automatic stay and further agreed that if they failed to make scheduled payments BB&T could foreclose on their properties. The Bankruptcy Court approved the stipulation and the Gesiorskis do not dispute that they failed to make the scheduled payments. Thus, pursuant to the sixth amended stipulation, BB&T was entitled to initiate foreclosure proceedings on the residential property even if, as the Gesiorskis claimed, a dispute existed regarding the amount due.

The Gesiorskis claim on appeal, however, that the sixth amended stipulation was not valid. See Appellant's Reply Br. at 33. Specifically, they claim that their attorney executed the stipulation

without their consent and that they are not bound by the stipulation merely because their attorney signed it. We disagree. Simply put, clients are bound by the actions of their attorneys. See Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 396 (1993). In addition, the Gesiorskis' assertion that they did not consent to the stipulation lacks merit. The Gesiorskis personally signed the first stipulation and the fourth amended stipulation. Like the sixth amended stipulation, the stipulations that they personally signed provided that BB&T would be entitled to foreclose on their properties if scheduled payments were not made. Furthermore, the Gesiorskis failed to challenge the validity of the stipulation prior to Bankruptcy Court's order denying their motion to reinstate the automatic stay. The sixth amended stipulation was approved by the Bankruptcy Court in September 2001, approximately five months before they filed their motion to reinstate the automatic stay.

The Gesiorskis also claim that the District Court violated their rights by failing to entertain the claims they raised for the first time on appeal. The District Court did not err in limiting the scope of its review to only those claims which had been presented to the Bankruptcy Court. As a general rule, an appellate court may only consider the record before the trial court. See In re Indian Palms Assocs., Ltd., 61 F.3d 197, 204-05 (3d Cir. 1995). Although an exception to this rule permits appellate review of an issue not raised in the trial court to serve the interests of justice, the grounds for this exception were not met in this case. See id. at 212 n. 25. To the extent that the Gesiorskis seek to have this Court consider claims not presented to the Bankruptcy Court, we likewise decline to do so. Finally, we have considered the Gesiorskis' other arguments raised on appeal and conclude that they lack merit and warrant no further discussion.

We will affirm the order of the District Court affirming the Bankruptcy Court's order denying the motion to reinstate the automatic stay and to compel an accounting. BB&T's motion to strike and supplemental motion to strike documents are granted to the extent that the documents listed in the motions were not a part of the District Court record. The Gesiorskis' motion to expand the record, motion for sanctions, motion to strike, and emergency motion to sell property are denied.

C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 30, 2002

#D-34

Docket No.02-4071

IN RE: GESIORSKI

Dawn S. Gesiorski; Gerald J. Gesiorski, Appellants
(Middle District of PA Civil No. 02-cv-01003)(WWC)

Present: ALITO, ROTH and RENDELL, Circuit Judges

1. Pro Se Appellants' Verified Motion for Stay Pending Appeal to the United States Court of Appeals for the Third Circuit.

2. Appellee's Response in Opposition to Appellants' Verified Motion for Stay Pending Appeal to the United States Court of Appeals.

3. Appellee's Motion to Strike Exhibits from Appellants' Motion for Stay Pending Appeal.

4. Appellants' Reply to Appellee's Response in Opposition to Appellants' Motion for Stay Pending Appeal to the United States Court of Appeals.

5. Appellants' Combined Response in Opposition and Memorandum in Support to Appellee's Motion to Strike Exhibits from Appellants' Motion for Stay Pending Appeal.

6. Appellants' Seek Permission to File this Verified Motion to Notice this Court of Imminent Foreclosure and Irreparable Damage Treated as a **Second** Motion for Stay Pending Appeal.

7. Appellee's Response in Opposition to Appellants' Second

Motion For Stay Pending Appeal..

8. Appellants' Verified Reply to Appellee's Response in Opposition To Appellants' Verified Motion to Notice this Court of Imminent Foreclosure and Irreparable Damage.

9. Verified Amended Motion for Stay Pending Appeal to the United States Court of Appeals for the Third Circuit Treated as a Document in Support of Appellants' Second Motion for Stay Pending Appeal.

10. Appellee's Response in Opposition to Appellants' Amended Verified Motion for Stay Pending Appeals for the Third Circuit with Memorandum of Law in Support attached.

11. Verified Reply to Appellee's Response in Opposition to Appellants' Motion for Stay Pending Appeal.

s/ Dana Moore
Dana Moore Case Manager

(267) 299-4927

ORDER

The foregoing is denied.

By the Court,
s/
Circuit Judge

Dated: April 16, 2003
DMM/cc: Mr. Gerald J. Gesiorski
Ms. Dawn S. Gesiorski
Andrew M. Croll, Esq.
Robert B. Scarlett, Esq.
Stephen C. Nudel, Esq.
Mark W. Allshouse, Esq.

D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 15, 2003
#C-42

Docket No.02-4071

IN R: GESIORSKI

GERALD J. GESIORSKI and DAWN S. GESIORSKI,
Appellants

vs.

BRANCH BANKING & TRUST CO.,
F/K/A CARROLL COUNTY BANK & TRUST
(Middle District of PA Civil No. 02-cv-01003)(WWC)

Present: NYGAARD and FUENTES, Circuit Judges

1. Clerk Order of December 31, 2002

2. Appellants' Verified Motion for Reconsideration of Appellants' Combined Verified Motion and Brief in Support of Request to Expand the Record pursuant to FRAP 10(e) for Good Cause, treated as a motion to review the Clerk's Order of December 31, 2002.

3. Appellee's Response in Opposition to Appellants' Motion for Reconsideration of Appellants' Combined Verified Motion and Brief In Support of Request to Expand the Record.

4. Appellants' Verified Motion for Reconsideration of Appellants' Verified Motion and Affidavit of Statement of Evidence for Inclusion In the Record Pursuant to FRAP 10©) for Good Cause, treated as a motion to review the Clerk's Order of December 31, 2002.

5. Appellee's Response in Opposition to Appellants' Motion for

Reconsideration of Appellants' Verified Motion and Affidavit of Statement of Evidence for Inclusion in the Record.

6. Appellant's Reply to Response by Appellees in Opposition to Appellants' Motion for Reconsideration of Request to Expand the Record pursuant To F.R.A.P. 10 (e)

7. Appellants' Reply to Response by Appellee in Opposition to Appellants' Motion for Reconsideration of Request of Evidence for Inclusion in The Record pursuant to F.R.A.P. 10 (c)

s/ Dana Moore
Dana Moore Case Manager
(267) 299-4927

ORDER

The foregoing motion is denied.

By the Court,
s/
Circuit Judge

Dated: February 24, 2003

DMM/cc: Mr. Gerald J. Gesiorski
Ms. Dawn S. Gesiorski
Stephen C. Nudel, Esq.
Mark W. Allshouse, Esq.
Andrew M. Croll, Esq.
Robert B. Scarlett, Esq.

E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 9, 2002
#C-26

Docket No.02-4071

IN RE: GESIORSKI
GERALD J. GESIORSKI and DAWN S. GESIORSKI,
Appellants
vs.
BRANCH BANKING & TRUST CO., F/K/A CARROLL COUNTY BANK & TRUST
(Middle District of PA Civil No. 02-cv-01003)(WWC)

Present: NYGAARD, FUENTES and STAPLETON, Circuit Judges

1. Pro Se Appellants' Verified Request for Suspension of Rule to Expedite Appeal which may be construed as a Motion to Expedite the Appeal.
2. Appellee's Response in Opposition to Appellants' Verified Request for Suspension of Rule to Expedite Appeal.
3. Pro Se Appellants' Verified Reply to Appellee's Response in Opposition to Appellants' Verified Reply to Appellee's Response in Opposition to Appellants' Verified Request for Suspension of Rule to Expedite Appeal.

s/ Dana Moore
Dana Moore Case Manager
(267) 299-4927

ORDER

The foregoing motion to expedite is denied.

By the Court,

s/
Circuit Judge

Dated: December 23, 2002
DMM/cc: DSG GJG MWA
SCN RBS AMC

F.

UNITED STATED COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4071

In Re: Gerald J. Gesiorski

To: Clerk

1) Motion by Appellants for Leave to File Addendum

2) Response in Opposition by Appellee to Appellants' Motion for Leave to File Addendum

---

The foregoing Motion and Response are considered. The Motion at (1) is also construed as a Motion for Leave to Expand the Record. So construed, the request for Leave to File Addendum is granted with filing as of the date of this Order with respect to the materials contained at the following: X through Z. The request for Leave to Expand the Record and the Response at (2) are referred to the merits panel with respect to the materials contained at the following: U through W-2. In the event that Appellants are awarded costs in this appeal, Appellants will not be entitled to recover costs associated with the Addendum.

For the Court,
s/ Marcia M. Waldran
Clerk

Dated: August 1, 2003
CPK/cc: GJG
DSG
RBS
AMC
MWA
SCN

G.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:		
GERALD J. GESIORSKI,	:	Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,		
Appellants	:	
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY	:	
BANK & TRUST,		
Appellee	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The pro se debtor appellants, Gerald J. Gesiorski and Dawn S. Gesiorski, are appealing our order of October 25, 2002, which affirmed the order of the bankruptcy court, dated May 3, 2002. The bankruptcy court's order denied Appellants' motion to reinstate the automatic stay in connection with the right of foreclosure on Appellants' residence held by the creditor appellee, Branch Banking and Trust Company.

We are considering two motions filed by Appellants:

(1) a motion under Fed. R. App. P. 10 (c) [1] to include in the

[1] Rule 10 (c) provides as follows:

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If a transcript of a hearing or trial is

record on appeal to the Third Circuit a twenty-two-page affidavit they recently executed in support of their claim that the Bank acted fraudulently and in collusion with Appellants' lawyers; and (2) a

motion under Fed. R. App. P. 10 (e) (2) [2] to expand the record to include certain exhibits that we had struck by order of September 6, 2002, and by the October 25 order that

---

unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be included by the district clerk in the record on appeal.

[2] In pertinent part, Rule 10 (e) (2) provides as follows:

(e) **Correction or Modification of the Record.**

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly.
(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
. . . .
(B) by the district court . . . .

affirmed the bankruptcy court's order. These exhibits consist mostly of correspondence between Appellants and their counsel and others.

We had refused to allow Appellants to expand the record while the appeal was before us because the evidentiary material had not been part of the record before the bankruptcy court, and we decided to apply the general rule that appeals are decided solely on the record presented to the lower court.

In the Rule 10 (e) (2) motion, Appellants present the same arguments they made before us for including these documents in the record; in material part, they assert that the wrongful conduct of

Appellees and Appellants' own counsel prevented this evidence from being part of the record. In opposition, the Bank argues that it will be prejudiced if the exhibits are allowed into the record now because they were not part of the record before the bankruptcy court and it had no opportunity to address them in the bankruptcy court. It also relies on the fact that we had previously stricken them from the record.

We agree with the Bank. We also note that Rule 10 (e) cannot be used to add to the record on appeal matters that did not occur in the course of proceedings leading to the order under review. *See Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3d Cir. 1986); *Hatco Corp. v. W.R. Grace & Co.*, 859 F. Supp. 769, 772 (D. N.J. 1994). Instead, the material must be evidence that was considered by the lower court but omitted from the record on appeal by mistake. See Chuan-Guo *Xiao v. Continuum Health Partners, Inc.*, 2002 WL 31760213 at *1 (S.D.N.Y). Further, Rule 10(e)'s purpose is not to facilitate collateral attacks on the order under review, *see Shasteen v. Saver*, 252 F.3d 929, 934 n.2 (7th Cir. 2001); *United States v. Armstrong*, 2003 WL 733881 (E.D. Pa.), and the material Appellants want to add to the record would be in support of reinstating the automatic stay.

In regard to the Rule 10(c) motion, in context that Rule normally applies only to proceedings where testimony is Taken or evidence introduced, see *Thomas v. City of New York*, 1997 WL 639242 (S.D.N.Y.), since it speaks about the unavailability of the transcript of a "hearing" or "trial." It would therefore not seem to support Appellants' attempt here to include their twenty-two-page afficavit in the record. The affidavit sets forth a number of factual allegations about

matters that did not happen at a hearing. While the document does mention a May 30, 2000, "hearing" that took place before Judge Woodside, the bankruptcy judge, it is obvious that this was merely a conference with the Judge, not an evidentiary hearing. Rule 10(c) would not apply to a conference with the court. *See Thomas, supra* (Rule 10(c) does not apply to oral arguments). Additionally, Rule 10(c), like Rule 10(e), should operate only to create a record of the proceedings on which the judgment under review is based, and the affidavit presents allegations that the bankruptcy court never considered.

Appellee did not oppose the Rule 10(c) motion, and Appellants point this out in their reply brief. However, we are not inclined to grant the motion on the basis of Appellee's failure to oppose it. We note that the Rule 10(c) motion, unlike the Rule 10(e) (2) motion, was not accompanied by any document designated as a brief. Generally, local practice requires that a brief in support of a motion be filed before a party is obliged to oppose it. Additionally, based on the foregoing paragraph, the motion has no merit anyway.

Accordingly, this 31st day of March, 2003, it is Ordered that Appellants' motion (doc. 75) under Fed. R. App. P. 10(c) to include in the record on appeal an affidavit and their motion (doc. 73) under Fed. R. App. P 10(e) to expand the record are denied.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

H.

UNITED STATED COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 02-4071

Gesiorski v. Branch Banking & Trust Co.

(MDPA No. 02-cv-01003)

To: Clerk

1) Motion by Appellants Pro Se to Proceed on the Original Record

2) Response by Appellee to Motion to Proceed on the Original Record

3) Reply by Appellants to Appellee's Response

The foregoing Motion, Response, and Reply are considered. The Motion is granted provided that the following documents are attached to appellants' brief at the time the brief is filed: (1) copy of the district court docket entries;(2) the notice of appeal; and (3) the order being appealed and any accompanying memorandum. The original record consists of only those documents which were considered by the District Court. The record is those documents which appear on the District Court docket. Any documents which do not appear on the District Court
docket are not considered to be part of the District Court record.

For the Court,
s/ Marcia M. Waldran
Clerk

Dated: December 31, 2002
DMM/cc: Mr. Gerald J. Gesiorski
Ms. Dawn S. Gesiorski
Robert B. Scarlett, Esq.
Andrew M. Croll, Esq.
Mark W. Allshouse, Esq.
Stephen C. Nudel, Esq.

I.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:		
GERALD J. GESIORSKI,	:	Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,		
Appellants	:	
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY	:	
BANK & TRUST,		
Appellee	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The debtor appellants, Gerald J. Gesiorski and Dawn S. Gesiorski, filed a motion on November 1, 2002, styled as a "verified petition for permission to appeal" to the Third Circuit. On November 12, 2002, they filed another motion, styled as a "verified petition to amend or vacate and re-enter certification order." Both motions seek appellate review of our order of October 25, 2002, denying Appellants' appeal of the bankruptcy Court's order of May 3, 2002. The latter order refused to reinstate the automatic stay, thereby clearing the way for Appellee to foreclase on Appellants' residence.

The reason for the "verified petitions" is the Appellants' belief that our October 25 order was not final for the purpose of appeal and thus that they were required to have the order certified for immediate appeal. However, contrary to Appellants' belief, our order was final, and they were only required to file a notice of appeal. In fact, their November 1 petition was treated as a notice of appeal, and we need not deal with that petition here. The November 12 petition will be dismissed as moot.

Accordingly, this 6th day of December, 2002, it is ordered that Appellants' motion, styled as a "verified petition" (doc. 66), filed November 12, 2002, "to amend or vacate and re-enter certification order' is dismissed as moot.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:		
GERALD J. GESIORSKI,	:	Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,		
Appellants	:	
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY	:	
BANK & TRUST,		
Appellee	:	

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The debtor appellants, Gerald J. Gesiorski and Dawn S. Gesiorski, filed a motion to stay our order of October 25, 2002, which affirmed the order of the bankruptcy court, dated May 3, 2002. The bankruptcy court's order denied Appellants' motion to reinstate the automatic stay in connection with the right of foreclosure on the Appellants' residence held by the creditor appellee, Branch Banking and Trust Company. The stay is sought pending Appellants' appeal of our October 25 order to the Court of Appeals for the Third Circuit.

By way of some background, in December 1992, Appellants borrowed $735,000 from the Bank's predecessor, mortgaging as security four commercial properties and their residence. In July 1997, judgment was confessed against Appellants in state court.

In October 1997, Appellants filed for Chapter 11 bankruptcy. In May 1998, Appellants and the Bank signed a "stipulation and consent order," approved by the bankruptcy court. The stipulation acknowledged the debt to the Bank. It also provided that Appellants agreed that the automatic stay would be lifted but that the Bank would not foreclose on the properties as long as Appellants made certain monthly payments and certain balloon payments as scheduled in the stipulation. If Appellants
did fail to make the payments as required, the Bank was entitled to

pursue its rights under Pennsylvania law to foreclose on the properties or to sell them without further order of court. Five other stipulations followed when Appellants defaulted on the first stipulation and successive ones in turn.

After Appellants defaulted on the sixth stipulation, Appellee indicated that it was going to foreclose on Appellants' residence. On February 19, 2002, Appellants responded by filing a motion in the bankruptcy court to reinstate the automatic stay and to compel an accounting of the mortgage account. The bankruptcy court denied this motion in its order of May 3, 2002, and we affirmed that order in our order of October 25, 2002.

The current motion for a stay seeks a stay of our October 25 order. Appellants filed the motion under Fed. R. Bankr. P. 8005, which deals with stays of bankruptcy court orders. We think the motion should have been filed under Fed. R. Bankr. P. 8017, which deals with stays of district court orders, but the issue is far from clear. In any event, the distinction is immaterial since we must apply the Rule 8005 standard for granting a stay to a stay sought under Rule 8017. *See In re Olick*, 1996 WL 287344 at *1 (E.D. Pa.) (citing In re *KAR Dev. Assocs.*, 182 B.R.
870, 872 (D. Kan 1995).

> Federal Rule of Bankruptcy Procedure 8005 permits a party to seek a stay pending appeal of an order of the bankruptcy court. *See* Fed. R. Bankr. P. 8005. The court may grant such a stay when the party seeking the stay can demonstrate that: (1) it has a likelihood of success on the merits of the appeal; (2) it will be subject to irreparable harm if the stay is not granted; (3) the granting of the stay will not substantially harm other interested parties; and (4) the granting of the stay would serve the public interest. See *In re Edwards*, 228 B.R. 573, 575 (Bankr. E.D. Pa. 1999). If the movant fails to make a showing on any one of these four factors, the court may deny the stay. *See In re Blackwell*, 162 B.R. 117, 120 (E.D. Pa. 1993).

The Hertz Corp. v. ANC Rental Corp. (*in re ANC Rental Corp.*) 2002 WL 1058196, at *2 (D. Del.) In addition, under either Rule 8005 or 8017, the court may condition a stay upon posting a bond.

Appellants argue that they satisfy this test. First, they will likely succeed on the merits because of their newly discovered

evidence, which, as they note, this court dismissed as newly presented evidence. Second, Appellants will suffer irreparable injury if a stay is not granted because their home may be sold at foreclosure while their appeal is being decided. Third, the Bank will not suffer any harm from a stay because Appellants will pay $800 into court every month to preserve the
status quo. Fourth, a stay is favored by the public interest in: (1) rehabilitation rather than liquidation in bankruptcy; and (2) protection of people against homelessness.

We will not grant a stay. Appellants have satisfied the irreparable-injury factor; losing the house one uses as his residence constitutes irreparable injury. *See Skinner v. SBA (in re Skinner)*, 202 B.R. 867, 869 (W.D. Vir. 1996); *Kroll v. IRS (In re Kroll)*, 1994 WL 650127 at *3 (W.D. Mich. 1994). However, based on our memorandum that accompanied the order denying the appeal, we conclude Appellants are not likely to succeed on the merits. We are also not convinced that the Bank will not be harmed by a stay as it will have to wait until the appeal is decided to foreclose. In this regard, Appellants' offer to pay $800 a month, rather than post a bond, is not adequate security, given
Appellants' financial situation. Finally, Appellants' public- interest argument is not concrete enough to be a factor favoring a stay. Assuming the public interests mentioned are valid ones, they are too abstract to satisfy the fourth factor since they merely argue for the public's interest in seeing that the law is complied with. *See Continental Group, Inc. v. Amoco Chem. Corp.*, 614 F.2d 351, 357-58 (3d Cir. 1980) (preliminary injunction motion); *Merrill Lynch v. Rodger*, 75 F. Supp. 2d 375, 383 (M.D. Pa. 1999) (Caldwell, J.) (preliminary injunction motion); *Armstrong World Industries, Inc. v. Allibert*, 1997 WL 793041 at *18-19 (E.D. Pa.) (preliminary injunction motion).

Accordingly, this 6th day of December, 2002, it is Ordered that Appellants' motion, filed November 4, 2002, for stay Pending appeal to the Third Circuit is denied.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

K.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI, DAWN S. GESIORSKI, Appellants	:	Bankruptcy No. 1-97-04554
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY BANK & TRUST, Appellee	:	

ORDER

AND NOW, this 25th day of October, 2002, it is ordered that:

1. Appellee's motion (doc. 49) to strike items from the appendix to Appellants' brief is granted and exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P are hereby stricken.
2. Appellants' motion to strike and to deny Appellee's motion to strike items and to correct and expand the record (doc. 53) is denied)
3. Appellants' appeal of the May 3, 2002, order of the bankruptcy court is hereby denied.
4. The Clerk of Court shall close this file.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

L.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:		
GERALD J. GESIORSKI, DAWN S. GESIORSKI, Appellants	:	Bankruptcy No. 1-97-04554
vs.	:	CIVIL ACTION NO. 1:CV-02-1003
CARROLL COUNTY BANK & TRUST, Appellee	:	

MEMORANDUM

I. Introduction.

We are considering the appeal of the pro se debtor-appellants, Gerald J. Gesiorski and Dawn S. Gesiorski, from the bankruptcy court's order of May 3, 2002. The order denied their motion to reinstate the automatic stay in connection with the right of foreclosure on Appellants' residence held by the creditor-appellee, Branch Banking and Trust Company, successor in interest to Carroll County Bank & Trust.

Invoking our general authority over bankruptcy proceedings, and asserting that some seven lawyers have not provided them with the assistance they needed in their Chapter 11 bankruptcy, Appellants raise on appeal many issues and claims, including claims seeking affirmative relief from Appellee by way of damages.

After review of Appellants' arguments, we see no need to depart from the normal procedure for handling bankruptcy cases, and will not consider the new issues and claims raised for the first time on appeal. On the grounds presented to the bankruptcy court, we do not

as reasons to lift the stay.

II. Background.

On December 23, 1992, Appellants borrowed $735,000 from Carroll County Bank & Trust, mortgaging as security four commercial properties and their residence. On July 11, 1997, the Bank confessed judgment against Appellants in the Court of Common Pleas of York County, Pennsylvania, in the amount of $811,772.45, including attorney's fees of $101,880.61. Appellants have never attacked this judgment in state court.

On October 24, 1997, Appellants filed for Chapter 11 bankruptcy. On May 21, 1998, Appellants and the Bank signed a "stipulation and consent order," approved by the bankruptcy court. The stipulation acknowledged the debt to the Bank. It also provided that Appellants agreed that the automatic stay would be lifted (making a reference to unresolved "lift stay actions") but that the Bank would not foreclose on the properties as long as Appellants made certain monthly payments and certain balloon payments as scheduled in the stipulation. If Appellants did fail to make payments as required, the Bank was entitled to pursue its rights under Pennsylvania law to foreclose on the properties or to sell them without further order of court.

Five other stipulations followed, on November 2, 1998, October 13, 1999, May 30, 2000, June 25, 2001, and September 10, 2001. These stipulations indicated that they came about because Appellants had defaulted on the first stipulation and successive ones in turn. Each of the stipulations permitted the Bank to foreclose if Appellants failed to meet the schedule of payments required. Appellants signed the first and fourth stipulations personally, and their lawyers signed each one.

After Appellants defaulted on the sixth stipulation, the appellee, Branch Banking and Trust Company (Carroll County Bank's successor), indicated that it was going to foreclose on Appellants' residence. On February 19, 2002, Appellants responded by filing a motion in the bankruptcy court to reinstate the automatic stay and to compel an accounting of the mortgage account. In the motion, Appellants disputed the amount due on the loan, alleging that the confessed judgment had overstated the principal amount due and noted that the judgment included over 100,000 in legal fees. The motion also alleged, among other things, that Appellants had made repeated

alleged, among other things, that Appellants had made repeated attempts for a detailed accounting from Appellee but had failed and that tax documents submitted to the IRS indicated discrepancies about interest payments Appellants had made. Further, Appellants believe that the payoff amount was substantially less than Appellee's calculation. In opposition, the Bank stated that it was entitled to foreclose after Appellants had defaulted on so many stipulations, that it had provided a detailed statement of how it had applied loan payments and that Appellants had never supplied their own calculation of the debt, even though they knew what payments they had made.

On May 3, 2002, the bankruptcy court denied the motion to reinstate the stay and this appeal followed. In the meantime, Appellee began foreclosure proceedings in state court.

In their appeal, relying on the district court's general jurisdiction over bankruptcy cases, Appellants present the following claims, claims that go beyond the issues related to the May 3 order, which attack the underlying debt and confession of judgment, and which sometimes request affirmative relief in the form of damages against Appellee.

Appellants begin with a claim that the Bank violated a letter of commitment incorporated into the mortgage note when they made a loan that exceeded the maximum loan-to-value ratio of the property. On this basis, they allege the note and lien are null and void and Appellants are entitled to reliance damages. Next, they claim the loan documents combined two mutually exclusive types of commercial paper, a deed of trust and a mortgage, resulting in an instrument that was void from the beginning; a Bank officer materially altered the amortization schedule from 360 days to 365 days, and Appellee should therefore be estopped from confessing judgment against Appellants; Appellants signed a first amended mortgage note under duress, fearing that they would lose their nest egg and retirement security; Bank officers refused to provide definitive buyout figures for each of the properties, thereby tortiously interfering with Appellant's signed contracts for their sale; Bank officers and their counsel caused the note to be non-negotiable by including a clause for confession of judgment, thereby tortiously preventing a buyout by a prospective purchaser; Bank officers fraudulently included a release clause in the second amended mortgage note that bettered their position and forced

confession should be opened by this court because the initial process on the judgment violated due process, there are meritorious defenses, including fraud, fraud in the inducement, and a dispute as to the amount; the judgment was confessed in violation of Pa. R. Civ. P. 2951(c) because there was no allegation that the instrument was a true and correct copy of the original; the Bank's counsel withheld material facts in the complaint for confession of judgment relating to the crediting of payments to certain aspects of the debt; the Bank was only entitled to legal rate of interest after judgment was confessed, not to the 9.6% rate it is still charging; the Bank's counsel violated the automatic stay by obtaining the proceeds of a fire insurance policy on one of the properties, thereby entitling Appellants to the return of these proceeds, lost rents and other losses in excess of $200,000. Appellants present other claims involving alleged violations of the automatic stay.

Appellants argue that they have been hampered in the bankruptcy proceedings by their own counsel. They allege they retained seven attorneys during the course of the proceedings, and none of them acted properly to protect their rights. (Supporting brief at p. 31). Appellants "repeatedly and exhaustively directed each counsel to file an objection to the Judgment due to inaccurate amounts stated as owed and improper service, with no success as evidenced by correspondence dated September 25, 1997, September 28, 1997, October 29, 1997 . . . ." (Id. at p. 23). The lawyers also had secret meetings and negotiations with bank counsel and told Appellants to adhere to the reorganization plan and the various consent orders with their "unconscionable balloon payments." (Id. at p. 31).

III. Discussion.

We begin by noting the procedural posture of this case. This is an appeal from the May 3, 2002, order of the bankruptcy court denying Appellants' motion to reinstate the automatic stay and for an accounting. In that motion, Appellants argued the stay should be reimposed only by disputing the amount due on the loan and by asserting they were thus entitled to an accounting before a sheriff's sale of their residence was allowed. Thus, the only matter before us as an appellate court is the validity of the bankruptcy court's decision not to reinstate the stay in the face of the contrary reasons Appellants presented to the bankruptcy court. "As a general rule, a court should

presented to the bankruptcy court. "As a general rule, a court should refuse to consider an issue that is raised for the first time on appeal." *Hutchins v. Commonwealth Mortgage Corp.*, 165 B.R. 401, 402 (E.D. Pa. 1994).

We therefore decline Appellants' invitation that we withdraw the reference to the bankruptcy court and use our jurisdiction over bankruptcy cases, *see* 28 U.S.C. § 157, to entertain new grounds not presented to the bankruptcy court or new claims for affirmative relief. We see no reason why this case should not follow the ordinary rules of bankruptcy procedure although we express no opinion on whether any of the new claims could not be presented in another forum.

Turning to the merits of the appeal, as Appellee argues, the six stipulations Appellants entered into defeat their request for reinstatement of the stay. As noted, each stipulation, beginning with the first one on May 21, 1998, acknowledged the debt to the bank and provided a payment plan that, if fulfilled by Appellants, would have prevented foreclosure. If Appellants did fail to make the payments as required, the Bank was entitled to pursue its rights under Pennsylvania law to foreclose on the properties or sell them without further order of the court. Appellants personally signed the first and fourth stipulations, and the bankruptcy court approved all of them. After Appellants' default, the Bank was entitled to foreclose, as permitted under the sixth stipulation, even if Appellants wanted an accounting.

"It is well recognized that 'valid stipulations entered into freely and fairly, and approved by the court, should not be lightly set aside.'" *In re Martin v. North Penn Savings & Loan*, 253 B.R. 346, 350 (M.D. Pa. 2000)(refusing to set aside a sheriff's sale by relying on a stipulation allowing a foreclosure in case of the debtor's breach of payment obligations under the stipulation).

Appellants attempt to defeat the stipulations by arguing against their lawyers. They maintain that: (1) they did not have a full understanding of the stipulations because their lawyers collaborated with bank counsel and withheld information from them, resulting in documents that were contrary to their interests; (2) the lawyers executed the stipulations without their consent. Citing *Waldorf v. Shuta*, 142 F.3d 601, 618 (3d Cir. 1998), they contend that this information represents newly discovered evidence that justifies relief from the stipulations. They also generally complain that their counsel

We reject this position. We see nothing in these allegations that requires us not to apply the general rule that a party is bound by the actions of his attorney. *In re Clark*, 2001 WL 1807509 (Bankr. E.D.N.Y.); *In re Quiles*, 262 B.R. 191, 196 (Bankr. D. R.I. 2001). Additionally, the lack-of-consent argument has no merit because Appellants signed the first and fourth stipulations themselves. Appellants have cited United States v. Denham, 817 F.2d 1307 (8th Cir. 1987), but it is distinguishable. In that case, the defendants' lawyer was also a creditor on an underlying matter who benefitted from the settlement of the action. Given this adverse interest, the court of appeals held that the defendants could pursue relief from the judgment entered as part of the settlement when they alleged the lawyer was part of the fraudulent scheme against them. In this case, Appellants' lawyers had no such adverse interest; they merely acted as counsel in the bankruptcy proceedings. Finally, Appellants' reliance on *Waldorf* is misplaced. Appellants do not have newly discovered evidence; just newly presented evidence. Their own averments on appeal indicate they were unhappy with counsel's performance throughout the course of the bankruptcy.

We have considered Appellants' other arguments bearing on the appeal. They have no merit. We will issue an appropriate order, which will also resolve two other pending motions.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: October 25, 2002

M.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI, DAWN S. GESIORSKI, Appellants	:	Bankruptcy No. 1-97-04554
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY BANK & TRUST, Appellee	:	

ORDER

AND NOW, this 6th day of September, 2002, upon consideration of Appellants' motion (doc. 31) to strike Appellee's motions and supporting documents from the record, it is ordered that the Appellants' motion is denied. Except for the briefs in support of, and in opposition to, Appellants' appeal of the bankruptcy Court's ruling of May 3, 2002, the parties shall not file any further documents or motions pending receipt of the court's disposition of Appellants' bankruptcy appeal.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

N.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI, DAWN S. GESIORSKI, Appellants	:	Bankruptcy No. 1-97-04554
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY BANK & TRUST, Appellee	:	

ORDER

AND NOW, this 6th day of September, 2002, upon consideration of Appellants' motion (doc. 26) to strike Appellants' request for a new trial, it is ordered that the motion is granted to the extent that any action the court may take after considering the merits of the appeal of the May 3, 2002, order will be limited to affirmance, reversal, modification or remand for a hearing before the bankruptcy court.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

O.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI, : Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,
Appellants :

vs. : CIVIL ACTION NO. 1 : CV-02-1003

CARROLL COUNTY :
BANK & TRUST,
Appellee :

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The appellee, Branch Banking and Trust Company, has filed a motion to strike items from the debtor Appellants' designation of items to be included in the record on appeal. Appellants have responded with a "motion to retain and review documents filed."

The Appellants are appealing a May 3, 2002, order of the bankruptcy court denying their motion to reinstate the automatic stay in connection with the right of foreclosure on the Appellants' residence held by the appellee bank. Appellee wants to strike documents basically consisting of the lengthy correspondence between Appellants and the different lawyers that represented them in their Chapter 11 bankruptcy. The correspondence was not part of the record before the bankruptcy
court.

In moving to strike, Appellee relies on the general rule that evidence presented for the first time on appeal is not considered by the appellate court. *See In re Green*, 252 B.R. 769, 771-72 (B.A.P. 8th Cir. 2000). They also argue that they would be prejudiced if the documents were allowed into the record because they had no opportunity to address them in the bankruptcy court and that these documents have

never been authenticated.

In opposition, Appellants point out that there is an exception to the general rule when the "interests of justice demand it." *Id.* At 772 (citing *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993)). They rely principally on the *Dakota* case, a trademark-infringement action involving a motion for a preliminary injunction. There, the Eighth Circuit considered evidence of the defendant's use of two other potentially infringing marks that had not been before the district court, in part, because: (1) the new evidence clearly showed the two other marks and that the defendant was using them; (2) the plaintiff's lawyers could not be blamed for the partial district-court record since discovery had not been completed at the preliminary-injunction stage; and (3) the circuit court had the impression that the defendant was "less than forthcoming" with it. 988 F.2d at 63 (footnote omitted).

Appellants argue that they are similarly arguing that The appellee bank has been deceptive both in the loan documents and in the bankruptcy court, with the "collaboration" of Appellants' own lawyers and without the Appellants' consent.

We agree with the Appellee and will follow the general rule. First, the exception Appellants rely on is a narrow one that should rarely be applied. *See In re Green, supra*, 252 B.R. at 772. Second, *Dakota* is distinguishable. The new evidence consisted of trademarks, easily compared to the plaintiff's. Also, the case was at the preliminary stage while here the bankruptcy has been ongoing for about five years and Appellants' lawyers could have presented in the bankruptcy court the evidence they wish to present now.[1] Further, the court does not have the
impression that the bank has been deceptive, although we understand Appellants believe it has been.

Accordingly, this 6th day of September, 2002, upon consideration of Appellee's motion (doc. 21) to strike items from Appellants' designation of items to be included in the record on appeal and Appellants' motion (doc. 23) to retain and review documents filed, it is ordered that:

1. Appellee's motion (doc. 21) to strike is granted.

2. Appellants' motion (doc. 23) to retain and review documents

documents filed is denied.

---

[1]We recognize that Appellants assert that their lawyers cooperated with the bank, but Appellants are bound by the actions of their lawyers. *In re Clark*, 2001 WL 1807509 (Bankr. E.D.N.Y.); *In re Quiles*, 262 B.R. 191, 196 (Bank. D. R.I. 2001).

3. The following items are stricken from the record on appeal of the order of May 3, 2002: S4, D1-D179, P1-P13, M1-M23, C1-C14, K1-
K5, F1-F27, V1-V3, and L1.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

P.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:
GERALD J. GESIORSKI, : Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,
Appellants :

vs. : CIVIL ACTION NO. 1 : CV-02-1003

CARROLL COUNTY :
BANK & TRUST,
Appellee :

ORDER

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The debtor Appellants have filed a motion to stay the order of the bankruptcy court dated May 3, 2002, pending disposition of their appeal of the order. The May 3 order denied the Appellants' motion to reinstate the automatic stay in connection with the right of foreclosure on the Appellants' residence held by the appellee, Branch Banking and Trust Company. After the bankruptcy court refused to reinstate the stay, the Appellee sent a notice of intent to foreclose, indicating that a sheriff's sale would take place approximately September 30, 2002.

Federal Rule of Bankruptcy Procedure 8005 permits a party to seek a stay pending appeal of an order of the bankruptcy court. *See* Fed. R. Bankr. P. 8005. The court may grant such a stay when the party seeking the stay can demonstrate that: (1) it has a likelihood of success on the merits of the appeal; (2) it will be subject to irreparable harm if the stay is not granted; (3) the granting of the stay will not substantially harm other interested parties; and (4) the granting of the stay would serve the public interest. *See In re Edwards*, 228 B.R. 573, 575 (Bankr. E.D. Pa. 1999). If the movant fails to make a showing on any one of these four factors, the court may deny the stay. *See In re*

Blackwell, 162 B.R. 117, 120 (E.D. Pa. 1993).
The Hertz Corp. v. ANC Rental Corp., 2002 WL 1058196, at *2 (D. Del.).

Upon consideration of these factors, we will not grant a stay. First, Appellants have not shown a likelihood of success on the merits. They assert that the May 3 order is erroneous because the Appellee has not provided them with an accurate explanation of the amount owed on the dept. We do not express any final determination on the merits, but in connection with the motion to stay pending appeal, we do not view this as a reason to stay foreclosure. Second, Appellants have not shown, irreparable harm. The foreclosure is some two months off, at the earliest. We should have a decision on the merits of the appeal before then.

Accordingly, this 29th day of July, 2002, it is ordered that Appellants' motion (doc. 8) to stay the May 3 order of the bankruptcy court is denied.

s/ William W. Caldwell
William W. Caldwell ed.
United States District Judge

Q.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI, DAWN S. GESIORSKI, Appellants	:	Bankruptcy No. 1-97-04554
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY BANK & TRUST, Appellee	:	

ORDER

AND NOW, this 29th day of July, 2002, upon consideration of Appellant's motion (doc. 7) for an extension of time to file a brief in support of their appeal, it is ordered that:

1. Appellants' request that they be excused from filing a supporting brief is denied. A briefing schedule for the appeal will be established by order of court after disposition of any motion by the Appellee challenging Appellants' designation of items to be included in the record.
2. Appellants need not prepare an appendix. The court will rely on the record filed in the district court to dispose of the appeal.
3. The request that any "defects" in the documents of record be excused is denied, but any defects may be ignored depending upon a challenge from Appellee.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

R.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:

GERALD J. GESIORSKI,	:	Bankruptcy No. 1-97-04554
DAWN S. GESIORSKI,		
Appellants	:	
vs.	:	CIVIL ACTION NO. 1 : CV-02-1003
CARROLL COUNTY	:	
BANK & TRUST,		
Appellee	:	

ORDER

AND NOW, this 29th day of July, 2002, upon consideration of Appellant's motion (doc. 4) to remand the appeal to the bankruptcy court to permit Appellee to file a designation of items for the record and to file motions concerning Appellants' designation of the record and the notice of appeal, it is ordered that:

1. Within ten days of the date of this order, the Clerk of the Bankruptcy Court shall file with the district court the Appellee's items designated for the record on appeal, as specified in the attached exhibit.

2. Within ten days of the date of this order, Appellee may file a motion in the district court, accompanied by a supporting brief, challenging Appellants' designation of items to be included in the record. Appellants shall have ten days thereafter to oppose Appellee's motion by brief or otherwise.

3. Appellee is authorized to seek dismissal of the appeal but any grounds for doing so shall be included in Appellee's opposition to the appeal, rather than set forth in a separate motion.

4. Appellants' motion (doc. 15) to file a reply to Appellee's reply brief is granted.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

S.

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	*	
GERALD J. GESIORSKI,	*	
Debtor	*	**Case No. 1-97-04554**
	*	**Chapter 11**
GERALD J. GESIORSKI,	*	
Movant	*	
vs.	*	
	*	
BRANCH BANKING & TRUST CO., f/k/a CARROLL COUNTY BANK & TRUST,	*	
Respondent	*	

ORDER

AND NOW, this 3rd day of May, 2002, the Motion filed by the Debtor to Reinstate the automatic stay and to compel an accounting is hereby DENIED.

BY THE COURT

s/ Robert J. Woodside
ROBERT J. WOODSIDE JDK
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

T.

THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE:	:	
GERALD J. GESIORSKI and	:	**CASE NO. 1-97-04554**
DAWN S. GESIORSKI ,	:	
Debtors-in-Possession,	:	**CHAPTER 11**

MOTION TO REINSTATE AUTOMATIC STAY AND TO COMPEL AN ACCOUNTING OF DEBTORS-IN-POSSESSION'S COMMERCIAL MORTGAGE ACCOUNT

AND NOW COME, Debtors-in-Possession, Gerald J. Gesiorski and Dawn S. Gesiorski, by and through their counsel, Law Offices of Craig A. Diehl, and respectfully move this Honorable Court to order reinstatement of the automatic stay against Carroll County Bank and trust Company and to compel an accounting, stating in support thereof the following:

1. Debtors-in-Possession had borrowed $735,000.00 from Carroll County Bank and Trust Compant on December 23, 1992, and provided a blanket mortgage on four (4) parcels of improved commercial real estate along with their personal residence as collateral to secure said loan.

2. Over the pendency of this Chapter 11 proceeding, Debtors-in-Possession entered into six (6) stipulations and consent orders granting the lifting of the automatic stay and providing adequate protection through a continual monthly obligation to Carroll County Bank and Trust Company.

3. Debtors-in-Possession have also liquidated or refinanced three (3) of the commercial properties and paid negotiated release amounts for each property to Carroll County Bank and Trust Company as described hereinafter:

A. $250,000.00 paid on February 4, 1998 for McKinley Avenue, Hanover, PA;

B. $60,000.00 paid on March 6, 1998 for 502 Meade Avenue, Hanover, PA; and

C. $148,500.00 paid on December 27, 2001 for 34

Frederick Street, Hanover, PA.

4. The fourth (4th) commercial property was destroyed by fire on May 22, 1998 and the fire insurance proceeds were paid to Carroll County Bank and Trust Company in the amount of $71,156.65 which disallowed Debtors-in-Possession to have sufficient funds to rehabilitate the property and to receive rental income to meet their monthly obligation to Carroll County Bank and Trust Company. These Court-escrowed funds of $71,156.65 were paid by Court Order despite the absence of a Court-ordered pre-requisite agreement of a "resolution of the differences between the Debtors and Bank".

5. Currently, Carroll County Bank and Trust Company has the first mortgage on Debtors-in-Possession's personal residence and has subordinated its position to a second mortgage position on 34 Frederick Street, Hanover, Pennsylvania.

6. Debtors-in-Possession have received a pre-approval commitment from Keystone Funding Company to refinance their personal residence for $180,000.00 conditioned on their bankruptcy discharge and a release of their personal residence from Carroll County Bank and Trust Company.

7. A dispute has arisen as to the actual amount owed to Carroll County Bank and Trust Company which has its origin from payments made to Carroll County Bank and Trust Company from January 23, 1993 through the present. The confessed judgment amount filed by Carroll County Bank and Trust Company on July 11, 1997 overstated the principal amount due of $679,204.13 while an audited amortization schedule for this loan indicates a principal amount due of $672,641.82, a variance of $6,562.31. Additionally, legal fees in the amount of $101,880.61 were included in the Confessed Judgment.

8. Although Carroll County Bank and Trust Company has provided portions of the account history to Debtors-in-Possession and counsel, no complete accounting from inception of the loan has been provided despite numerous requests which itemizes the amortization of payments, attorney fees, appraisal costs, court costs, and other expenditures imposed against Debtors-in-Possession's account.

9. Repeated oral and written requests by Debtors-in-Possession for the application of monthly payments made to Carroll County Bank and Trust Company have been ignored and not responded to which have seriously impaired and impeded Debtors-in-Possession's

ability to accurately know what is owed to Carroll County Bank and Trust Company.

10. In January 2002, debtors-in-Possession received their Internal Revenue Service Form 1098 from Carroll County Bank and Trust Company reporting $53,509.30 as interest payments, when in fact, the total gross monthly payments paid to Carroll County Bank and Trust Company for the entire year of 2001 was only $45,900.00 this discrepancy of the payments to Carroll County Bank and Trust Company for the year of 2001 in the amount of $45,900.00 versus the reported interest of $53,509.30 does not include or take into consideration the principal amounts that should have been applied to Debtors-in-Possession's account, creating an even greater variance.

11. Carroll County Bank and Trust Company has failed to send Debtors-in-Possession the required Internal Revenue Service Form 1098 for the interest the Bank received for years 1997, 1998, 1999, and 2000. These forms have been requested both orally and in writing by Debtors-in-Possession and these efforts have been ignored and not responded to.

12. Debtors-in-Possession believe that the balance still owed to Carroll County Bank and Trust Company is less than $125,000.00; however, Carroll County Bank and Trust Company has provided a substantially higher payoff amount.

13. While Debtors-in-Possession were trying to refinance their personal residence, various mortgage brokers working on behalf of Debtors-in-Possession were provided with three (3) different payoff amounts from Carroll County Bank and Trust Company. On another occasion, Carroll County Bank and Trust Company reported a different and inconsistent balance due which conflicted with the other balances provided to the prospective lenders seeking to refinance Debtors-in-Possession's total debt with Carroll County Bank and Trust Company.

14. Carroll County Bank and Trust Company has now verbally threatened to commence foreclosure proceedings of Debtors-in-Possession's personal residence and the commercial property situate at 34 Frederick Street, Hanover, Pennsylvania. Should the foreclosure be commenced, it may cause the denial of Debtors-in-Possession's pre-approved commitment for $180,000.00 and bring further irreparable harm and damage to them.

15. Debtors-in-Possession seek this Court's equitable power

to reinstate the automatic stay until the information necessary to confirm an accurate payoff can be reviewed and ascertained.

WHEREFORE, Debtors-in-Possession, Gerald J. Gesiorski and Dawn S. Gesiorski, respectfully request this Court to reinstate the automatic stay, compel Carroll County Bank and Trust Company to provide a complete, itemized history of Debtor's account since inception of the loan on December 23, 1992, and provide the Internal Revenue Service Form 1098 for the years 1997, 1998, 1999, and 2000 to Debtors-in-Possession within fifteen (15) days.

Respectfully submitted,
LAW OFFICES OF CRAIG A. DIEHL

Dated: February 15, 2002

By: s/ Craig A. Diehl
Craig A. Diehl, Esquire
Attorney ID No. 52801
3464 Trindle Road
Camp Hill, PA 17011-4436
(717) 763-7613

Counsel for Debtors-in-Possession

U.

United States Court of Appeals for the Third Circuit

Date: March 11, 2004

To:

Mr. Gerald J. Gesiorski
Ms. Dawn S. Gesiorski
Robert B. Scarlett, Esq.
Andrew M. Croll, Esq.
Mark W. Allshouse, Esq.
Stephen C. Nudel, Esq.

Re: **Case No. 02-4071 In Re: Gesiorski**

The purpose of this communication is to provide notice that judgment has been entered, and information about post-judgment practice.

NOTICE OF JUDGMENT

This Court's opinion was filed and **judgment was entered today** pursuant to Rule 36 of the Federal Rules of Appellate Procedure [FRAP] in the above referenced case. A copy of the opinion and judgment are enclosed.

PETITION FOR REHEARING [FRAP] 35&40, Third Circuit LAR 35, IOP 9]

Timing. A petition for panel rehearing and/or en banc rehearing may be filed within 14 days of the date of entry of judgment, unless the appeal is in a civil case where the United States is a party, in which case the petition for rehearing may be filed within 45 days of entry of judgment. A petition from counsel or a non-incarcerated litigant must be **received** in the clerk's office (not placed in the mail) within the time permitted.

Incarcerated petitioners should include the following statement: "I certify that this document was given to prison officials, postage prepaid, on [date] for forwarding to the Court of Appeals. I certify under penalty of perjury that the foregoing is true and correct. [signiture]" 28 U.S.C.Sec. 1746. The petition must be served on all

parties.

Criteria and Required Statement [See FRAP 35(b) & 40(a)(2), Third Circuit IOP 9.]
[Petitions for Rehearing en Banc are NOT favored.]

Panel Rehearing. The petition must state with particularity each point of fact and law the panel overlooked or misapprehended.

En Banc Rehearing. The petition must begin with a statement that either:

the panel decision conflicts with a decision of the United States Supreme Court or the Third Circuit, with citation(s), and consideration by the full court is therefore necessary; or

the proceeding involves one or more question of exceptional importance, each of which must be concisely stated.

Required statement by counsel under LAR 35.1:
Counsel must preface the petition with the statement, "I express a belief, based on a reasoned professional judgment that... [the criteria of Rule 35(b)(1) above are met.]"

Presumption that both Panel and En Banc Rehearing have Been Requested [Third Circuit IOP 9.5.1]
Unless it is explicitly stated that the rehearing requested is from the panel only, it will be presumed that the petition requests both panel and en banc rehearing.

Page Limits. The 15 page limit is strictly enforced. If both panel and en banc rehearing are requested, the Court prefers that a single petition be filed. If separate petitions are filed, they will be treated as a single document and will be subject to a combined 15 page limit. [FRAP 35(b) (2) &(3).] No answer to a petition for rehearing is permitted unless requested by the Court. If an answer is requested, it is also limited to 15 pages.

Number of Copies. An original plus 3 copies are required for a petition for panel rehearing; an original plus 14 are required for a petition en banc rehearing.

Attachments. A copy of the judgment and opinion or order must be attached. No other attachments are permitted without leave of the Court. [LAR 32.3(b) & 35.2]

Electronic Filing. Please refer to the Court's website www.ca3 .uscourts.gov for instructions on the electronic filing of petitions for rehearing.

BILL OF COST [FRAP 39, Third Circuit LAR 39]
Filing Time. A part to whom costs are allowed who desires taxation of costs must file a bill of costs within 14 days after entry of judgment. The bill of costs must be received in the clerk's office within the 14 day period. Consult Rule 39 of the Federal Rules of Appellate Procedure and the judgment in your case to determine if you may ask for costs.

Form. A request for costs must include either an itemized statement from a printer or an affidavit as required in the attached bill of costs form. [See Third Circuit LAR 39.3 for allowable costs.]

MANDATE [frap 41]
The mandate is the official notification to the district court that the court of appeals has entered judgment.

Issuance Time. The mandate issues 7 days after the time for filing a petition for rehearing has expired. [FRAP 41(a)] If no timely petition for rehearing has been filed, the mandate will issue 21 days after entry of judgment, unless the United States is a party, in which case the mandate will issue 52 days after entry of judgment. If a motion for stay of mandate is filed, the mandate will issue 7 days after an order denying the motion.

If the mandate has been stayed pending disposition of a petition for writ of certiorari, the mandate will issue immediately upon notice by

been affirmed. [FRAP 41(d)(2)(D)]

Effective Date of Mandate [FRAP 41(c)]. The Court's mandate is effective when issued. Ordinarily, the mandate shall consist of a certified copy of the judgment with any opinion and instructions as to costs attached, in lieu a separate, formal mandate.

Stay of Mandate [FRAP 41(c)]. The timely filing of a petition for rehearing, rehearing en banc or a motion to stay the mandate will automatically stay the mandate.

Filing a motion to stay the mandate is not a prerequisite for filing a petition for a writ of certiorari to the Supreme Court. Such a motion shall be made only where issuance of the mandate would have a **substantial effect** [See IOP 10.8.2], in which case the motion must be filed promptly.

A motion to stay the mandate must be served on all parties, and must demonstrate that a petition for writ of certiorari would present a substantial question and that there is good cause for a stay. [FRAP 41(d)(2)(A)]

The stay may not exceed 90 days, unless either:

the stay is extended for good cause shown; or

a petition for a writ of certiorari is filed within the stay period.

Please consult the Rules of the Supreme Court of the United States regarding the timing and filing of a petition for certiorari. Case managers can not advise you concerning Supreme Court Rules.

MARCIA M. WALDRON
Clerk
s/ Dana M. Moore
By: Dana M. Moore
Case Manager
Direct Dial 267-299-4927

Enclosures (Bill of Costs Form)
Rev. 7/01

(2)

No. 03-1477

In the

Supreme Court of the United States

GERALD J. GESIORSKI and
DAWN S. GESIORSKI,

Petitioners,

v.

BRANCH BANKING & TRUST COMPANY,
successor-in-interest to CARROLL COUNTY BANK & TRUST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is there a compelling reason for this Court to reconsider its holding that bankruptcy judges have jurisdiction to hear and determine motions regarding the termination, annulment or modification of the automatic stay arising in cases under Title 11 of the United States Code?

2. Is there a compelling reason for this Court to reconsider its holding that appellants fail to preserve for appeal any issue which they failed to raise in the lower court and any matter as to which they failed to place into the record on appeal any evidence?

3. Is there a compelling reason for this Court to reconsider its holding that issue preclusion applies to bankruptcy proceedings?

4. Is there a compelling reason for this Court to reconsider its holding that litigants are bound by the actions of their attorneys?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent does not have a parent corporation and no publicly held company owns 10% or more of Respondent's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS ix

Statutes ix

Rules ix

STATEMENT OF THE CASE 1

ARGUMENT 3

1. Bankruptcy judges have jurisdiction to hear and determine motions regarding the termination, annulment or modification of the automatic stay arising in cases under Title 11 of the United States Code 3

Page

2. Petitioners failed to preserve for appeal any issue which they failed to raise in the lower court and any matter as to which they failed to place into the record on appeal any evidence 8

3. Petitioners are bound by their court-approved stipulations of fact and consents to relief from stay; the relief they seek is barred by the doctrines of issue preclusion, equitable estoppel and waiver 11

4. Petitioners are bound by the actions of their attorneys 14

CONCLUSION 15

APPENDIX ..... App. 1

TABLE OF CITED AUTHORITIES

Cases

Page

In re Anes, 195 F.3d 177 (3d Cir. 1999) 9

Bandai Am., Inc. v. Bally Midway Mfg. Co.,
775 F.2d 70 (3d Cir. 1985), cert. denied,
475 U.S. 1047, 89 L.Ed.2d 574,
106 S.Ct. 1265 (1986) 12

Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990) 5

In re Candor Diamond Corp.,
26 B.R. 844 (S.D.N.Y. 1983) 9, 10

In re Cook, 146 B.R. 934 (Bankr.E.D.Pa. 1992) 10

Corestates Bank, N.A. v. Huls Am., Inc.,
176 F.3d 187 (3d Cir. 1999) 12

Corestates Bank, N.A. v.
United Chem. Technologies, Inc.,
202 B.R. 33 (E.D.Pa. 1996) 8

In re Crain, 158 B.R. 608 (Bankr.W.D.Pa. 1994) 13

Ervin v. Pittsburgh, 339 Pa. 241,
14 A.2d 297 (Pa. 1940) 13

In re F.B.F. Indus., Inc.,
165 B.R. 544 (Bankr.E.D.Pa. 1994) 14

Page

Faretta v. Cal., 422 U.S. 806,
45 L.Ed.2d 562, 95 S. Ct. 2525 (1975) 10

Graham v. IRS, 973 F.2d 1089 (3d Cir. 1992) 12

In re Green, 252 B.R. 769 (B.A.P. 8th Cir. 2000) 9

Grogan v. Garner, 112 L.Ed.2d 755,
111 S.Ct. 654 (1991) 12

In re Guild & Gallery Plus, Inc.,
72 F.3d 1171 (3d Cir. 1996) 5

Halper v. Halper, 164 F.3d 830 (3d Cir. 1999) 7

Harris v. City of Phila., 35 F.3d 840 (3d Cir. 1994) 8

Hormel v. Helvering, 312 U.S. 552,
85 L.Ed. 1037, 61 S.Ct. 719 (1941) 8

Hutchins v. Commonwealth Mortgage Corp.,
165 B.R. 401 (E.D.Pa. 1994) 8

In re IM, 256 B.R. 437 (Bankr.E.D.Pa. 2000) 13

In re Indian Palms Assoc., Ltd.,
61 F.3d 197 (3d Cir. 1995) 8, 10

In re Marcus Hook Development Park, Inc.,
943 F.2d 261 (3d Cir. 1991) 4

Page

In re Marquee Television Network, Inc.,
98 B.R. 191, *vacated on other grounds*,
98 B.R. 191 (E.D.Pa. 1989) 9

In re Martin, 253 B.R. 346 (M.D.Pa. 2000) 11

In re Middle Atl. Stud Welding Co.,
503 F.2d 1133 (3d Cir. 1974) 8

In re Neshaminy Office Bldg. Assoc.,
62 B.R. 798 (E.D.Pa. 1986) 9

In re New Knight, Inc.,
291 B.R.367 (Bankr.E.D.Pa. 2003) 5

Northern Pipeline Const. Co.
v. Marathon Pipeline Co.,
458 U.S. 50, 73 L. Ed. 2d 598,
102 S. Ct. 2858 (1982) 5, 6

Pioneer Inv. Serv. Co.
v. Brunswick Assoc. Ltd. P'ship,
507 U.S. 380, 123 L.Ed.2d 74,
113 S.Ct. 1489 (1993) 15

In re Quiles, 262 B.R. 191 (Bankr.D.R.I. 2001) 14

Samuel J. Marranca Gen'l Contracting Co., Inc.
v. Amerimar Cherry Hill Assoc. Ltd. P'ship,
416 Pa.Super. 45, 610 A.2d 499 (1992) 14

Page

Schifalacqua v. CNA Ins.,
567 F.2d 1255 (3d Cir. 1977) 14

Singleton v. Wulff, 428 U.S. 106,
49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) 8

Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998) 11

In re Wood, 825 F.2d 90 (5th Cir. 1987) 5

In re Wright, 223 B.R. 886 (Bankr.E.D.Pa. 1998) 10

Young v. PHEAA, 225 B.R. 312
(Bankr.E.D.Pa. 1998) 10

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

Page

Statutes

11 U.S.C. § 362 ..... 2, 7, 11, App. 1

28 U.S.C. § 157 ..... 4, 6, 7, App. 2

28 U.S.C. §158 ..... 4, App. 3

28 U.S.C. § 1334 ..... 4, 6, App. 3

Rules

Sup.Ct.R. 10 ..... 3, App. 3

Fed.R.Bankr.P. 3007 ..... 12, App. 4

Fed.R.Bankr.P. 8013 ..... 9, App. 4

STATEMENT OF THE CASE

On December 23, 1992, Respondent loaned to Petitioners the sum of $735,000 (the "Loan") in consideration of, *inter alia,* the execution by Petitioners of a commercial promissory note (the "Note") in favor of Respondent and the grant by Petitioners to Respondent of a security interest in four commercial properties and Petitioners' residence. Petitioners defaulted on their obligations to Respondent under the terms of the Note. Pet., App. 4a, 19a, 24a.

On or about July 11, 1997, Respondent initiated in the Court of Common Pleas of York County, Pennsylvania, the case of Carroll County Bank & Trust v. Gesiorski (Case No. 97-NO-01961-01) and judgment by confession was entered in favor of Respondent and against Petitioners in the amount of $811,772.45 (the "Confessed Judgment"). Petitioners have filed no motion to open, modify or vacate the Confessed Judgment. *Id.*

On October 24, 1997, Petitioners initiated in the United States Bankruptcy Court for the Middle District of Pennsylvania the case of *In re* Gesiorski (Case No. 1-97-04554 RJW-1) (the "Bankruptcy Case") with the filing of a Voluntary Petition under Chapter 11 of the United States Bankruptcy Code. *Id.*

On January 15, 1998, BB&T filed in the Bankruptcy Case a Proof of Claim (the "Proof of Claim") based upon the Confessed Judgment. Petitioners have filed no objection to the Proof of Claim. Pet., App. 4a.

During the pendency of the Bankruptcy Case, Petitioners and Respondent entered into seven court-approved stipulations and consent orders (collectively, the "Consent

Orders") granting relief from the 11 U.S.C. § 362 automatic stay and providing for adequate protection payments by Petitioners to Respondent. In each of the Consent Orders, Petitioners acknowledged the Confessed Judgment. Petitioners defaulted on their obligations to Respondent under the terms of each of the Consent Orders. Pet., App. 4a, 19a - 20a, 24a - 25a.

On February 19, 2002, in reaction to Respondent's indication that it was considering exercising its foreclosure rights under the terms of the Consent Orders and the laws of the Commonwealth of Pennsylvania, Petitioners filed in the Bankruptcy Case a motion to reinstate the automatic stay. By Order entered May 3, 2002 (the "Bankruptcy Order"), the Bankruptcy Court denied the motion. Pet., App. 4a - 5a, 20a, 25a, 31a, 38a - 42a.

On May 13, 2002, Petitioners initiated in the United States District Court for the Middle District of Pennsylvania the case of Gesiorski v. Branch Banking & Trust Co. (Case No. 1:02-cv-01003) with the filing of a notice of appeal. By Order entered October 25, 2002, the District Court affirmed the Bankruptcy Order. Pet., App. 5a, 22a.

On November 6, 2002, Petitioners initiated in the United States Court of Appeals for the Fourth Circuit the case of Gesiorski v. Branch Banking & Trust Co. (Docket No. 02-4071) with the filing of a notice of appeal. By Judgment entered March 11, 2004, the Court of Appeals affirmed the decision of the District Court. Pet., App. 1a - 2a.

On April 30, 2004, Petitioners filed a petition for writ of *certiorari* and the instant case was docketed in this Court.

ARGUMENT

There is no compelling reason to grant the petition for writ of *certiorari.* This case does not involve a Court of Appeals decision in conflict with the decision of another Court of Appeals on the same important matter. This case does not involve an important federal question decided by a Court of Appeals in a way that conflicts with a decision by a state court of last resort. This case does not involve a Court of Appeals decision which has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. This case does not involve an important federal question decided by a state court of last resort in a way that conflicts with the decision of another state court of last resort or of a Court of Appeals. This case does not involve a state court or Court of Appeals decision on an important question of federal law that has not been, but should be, settled by this Court. This case does not involve a state court or Court of Appeals decision on an important federal question in a way that conflicts with relevant decisions of this Court. *See* Sup.Ct.R. 10. This case is simply another link in a long chain of frivolous, dilatory maneuvers by Petitioners.

1. Bankruptcy judges have jurisdiction to hear and determine motions regarding the termination, annulment or modification of the automatic stay arising in cases under Title 11 of the United States Code.

Petitioners, who submitted themselves to the jurisdiction of the Bankruptcy Court by filing both their Chapter 11 proceeding and the motion for reinstatement of the automatic stay which is the subject of this appeal, now argue that the Bankruptcy Court had no jurisdiction over the matter. That

disingenuous argument has not only not been preserved for appeal because it was raised for the first time in the Court of Appeals, it also ignores the current state of affairs regarding bankruptcy court jurisdiction.

The Code states that, "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." 28 U.S.C. § 1334(a). Subsection (b) states that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

The Code also states that "[e]ach district court may provide that . . . any or all proceedings . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a).

The Code further provides that "Bankruptcy judges may hear and determine. . . all core proceedings . . . arising in a case under title 11 . . . and may enter appropriate orders and judgments, subject to review under section 158 of this title." 11 U.S.C. § 157(b)(1). "Core proceedings" are defined to include "motions to terminate, annul, or modify the automatic stay." 11 U.S.C. § 157(b)(2)(G). Otherwise stated,

> [a] proceeding is classified as "core" under 28 U.S.C. § 157 "if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *In re* Marcus Hook

> Development Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991) (quoting Beard v. Braunstein, 914 F.2d 434, 444 (3d Cir. 1990) which, in turn, quoted *In re* Wood, 825 F.2d 90, 97 [(5th Cir. 1987)]). Thus, "if the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy it is not a core proceeding . . . ." *In re* Guild & Gallery Plus, Inc., 72 F.3d 1171, 1178 (3d Cir. 1996).

In re New Knight, Inc., 291 B.R.367 (Bankr.E.D.Pa. 2003).

The Court of Appeals for the Third Circuit has discussed the issue of bankruptcy court jurisdiction as follows:

> Bankruptcy Court jurisdiction has been the subject of heated controversy in recent decades. In 1978, Congress attempted to centralize bankruptcy jurisdiction by granting District and Bankruptcy Courts expanded jurisdiction over cases arising under title 11. Under this scheme, Article I bankruptcy judges possessed full power to adjudicate not only cases arising directly under title 11, but also a wide range of other claims merely "related to" the title 11 proceedings. In Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 73 L. Ed. 2d 598, 102 S. Ct. 2858 (1982), however, the Supreme Court held the 1978 jurisdictional reform unconstitutional because its grant of judicial power to Article I Bankruptcy Courts violated the separation of powers doctrine by undermining Article III's

establishment of an independent judiciary.

In Marathon, the debtor had filed a chapter 11 petition in Bankruptcy Court and subsequently initiated an adversary proceeding against Marathon for various pre-petition violations of state law including breach of contract. The parties to the adversary proceeding were not diverse, and the dispute involved pure questions of state law presenting no federal question. The only basis for federal jurisdiction was the fact that one party was a chapter 11 debtor in bankruptcy. Distinguishing "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power . . . from the adjudication of state-created private rights, such as the right to recover damages that is at issue in this case," Justice Brennan concluded that the statute violated Article III because it unconstitutionally vested "all 'essential attributes' of the judicial power of the United States in the 'adjunct' [Article I] bankruptcy courts."

In 1984, Congress responded to Marathon and established the current bankruptcy jurisdiction regime codified at 28 U.S.C. § 1334 and 28 U.S.C. § 157. Section 1334 vests broad primary jurisdiction over bankruptcy proceedings in the District Courts. District Courts may, however, refer bankruptcy matters falling within their jurisdiction to the Bankruptcy Courts under 28 U.S.C. § 157(a). District Courts have exercised this power by

> "routinely referring most bankruptcy cases to the bankruptcy courts."
>
> Thus, a proceeding's core or non-core nature is crucial in bankruptcy cases because it defines both the extent of the Bankruptcy Court's jurisdiction, and the standard by which the District Court reviews its factual findings. To determine whether a proceeding is a "core" proceeding, courts of this Circuit must consult two sources. First, a court must consult § 157(b). Although § 157(b) does not precisely define "core" proceedings, it nonetheless provides an illustrative list of proceedings that may be considered "core." Second, the court must apply this court's test for a "core" proceeding. Under that test, "'a proceeding is core (1) if it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case.'"

Halper v. Halper, 164 F.3d 830 (3d Cir. 1999) (citations omitted).

The Bankruptcy Court had jurisdiction to hear and determine the proceeding involving the automatic stay in this case because the proceeding is a "core" proceeding. It is a type of proceeding specifically enumerated in 11 U.S.C. § 157(b). Moreover, it satisfies the Third Circuit's test for a "core" proceeding because it both invokes a substantive right provided by 11 U.S.C. § 362 and, by its nature, could arise only in the context of a bankruptcy case.

2. Petitioners failed to preserve for appeal any issue which they failed to raise in the lower court and any matter as to which they failed to place into the record on appeal any evidence.

As a general rule, an appellate court may only consider the record before the trial court. *In re* Indian Palms Assoc., Ltd., 61 F.3d 197 (3d Cir. 1995). *See also* Corestates Bank, N.A. v. United Chem. Technologies, Inc., 202 B.R. 33 (E.D.Pa. 1996) (refusing to hear claim that Chapter 11 plan was unfairly discriminatory as it was neither submitted to, nor considered by, the bankruptcy court); Harris v. City of Phila., 35 F.3d 840 (3d Cir. 1994) (noting that appellate court "will not consider issues that are raised for the first time on appeal"); *In re* Middle Atl. Stud Welding Co., 503 F.2d 1133 (3d Cir. 1974) (refusing to entertain contentions not raised before bankruptcy referee).

"[A] court should refuse to consider an issue that is raised for the first time on appeal." Hutchins v. Commonwealth Mortgage Corp., 165 B.R. 401 (E.D.Pa. 1994) (citations omitted). Such refusal is "essential in order that parties may have the opportunity to offer all the evidence they believe is relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decisions there of issues upon which they have had no opportunity to introduce evidence." Singleton v. Wulff, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) (quoting Hormel v. Helvering, 312 U.S. 552, 85 L.Ed. 1037, 61 S.Ct. 719 (1941)).

Even assuming, *arguendo,* that Petitioners' arguments regarding issues such as alleged alteration of loan documents somehow have merit, such issues were not raised in the Bankruptcy Court. To permit Petitioners to do so on appeal would result in surprise to Respondent from an appellate

decision on issues as to which Respondent had no opportunity to introduce evidence in the Bankruptcy Court.

The record on appeal in bankruptcy proceedings should contain the documentation necessary to afford the reviewing court a complete understanding of the case. *See* *In re* Candor Diamond Corp., 26 B.R. 844 (S.D.N.Y. 1983). *See also* *In re* Marquee Television Network, Inc., 98 B.R. 191, *vacated on other grounds,* 98 B.R. 191 (E.D.Pa. 1989) ("With the record . . . incomplete, appellant has not demonstrated that there is any error, let alone clear error in the judgment below."); *In re* Anes, 195 F.3d 177 (3d Cir. 1999) ("In core matters, the District Court reviews the Bankruptcy Court's findings of fact for clear error and its conclusions of law *de novo*."); Fed.R.Bankr.P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . .").

In this case, conspicuous by its absence from the record on appeal was any evidence that Petitioners took any action to vacate the Confessed Judgment or dispute the Proof of Claim, or regarding such matters as alleged alteration of loan documents and invalidity of the deed of trust, which would demonstrate any error in the judgment below.

Certain items which Petitioners attempted to include in the record on appeal were not part of the Bankruptcy Court record and were thus not properly part of the record on appeal. "It is well settled that 'documents presented for the first time at the appellate stage of any proceeding are generally not considered part of the record for the review by the appellate court.'" *In re* Green, 252 B.R. 769 (B.A.P. 8th Cir. 2000) (citations omitted). "'Only those papers and exhibits filed in the [trial] court can constitute the record on appeal.'" *Id.* (citations omitted). *See also* *In re* Neshaminy Office Bldg.

Assoc., 62 B.R. 798 (E.D.Pa. 1986) ("Items not before the Bankruptcy Court and not considered by it in rendering its decision may not be included in the record.") (citing Candor, *supra*). *Cf.* Indian Palms, *supra* (holding that "motion to strike was properly denied because the documents which [movant] sought to strike from the appellate record, having been filed in the bankruptcy case record, ***were*** part of the relevant record in this contested matter.") (citations omitted) (emphasis added).

The fact that Appellants are *pro se* has no bearing on this issue. The right of self-representation is not "a license not to comply with relevant rules of procedure and substantive law." Faretta v. Cal., 422 U.S. 806, 45 L.Ed.2d 562, 95 S. Ct. 2525 (1975). *See also* Young v. PHEAA, 225 B.R. 312 (Bankr.E.D.Pa. 1998) ("This court cannot and will not consider 'evidence' not of record. The only dispensation which we can make in light of the Debtor's *pro se* status is to lighten the admonition for her doing so."). *Cf. In re* Cook, 146 B.R. 934 (Bankr.E.D.Pa. 1992) (*pro se* litigant's attempt to attach to a post-trial brief "evidence" not offered at trial was unavailing); *In re* Wright, 223 B.R. 886 (Bankr.E.D.Pa. 1998) ("'Although the pleadings of *pro se* litigants are construed liberally, there is no lower standard when it comes to rules of evidence and procedure.' As to their claims . . . , they are therefore held to the same burdens of proving the necessary elements of their claims as any litigant, represented by counsel or not.") (citations omitted).

The consideration by the Circuit Court of matters not in the record on appeal would have been extremely prejudicial to Respondent, which had no opportunity to address such issues and documents in the Bankruptcy Court.

3. Petitioners are bound by their court-approved stipulations of fact and consents to relief from stay; the relief they seek is barred by the doctrines of issue preclusion, equitable estoppel and waiver.

"It is well recognized that 'valid stipulations entered into freely and fairly, and approved by the court, should not be lightly set aside.'" *In re* Martin, 253 B.R. 346 (M.D.Pa. 2000) (citations omitted). "In general, courts encourage parties to enter into stipulations to promote judicial economy by narrowing the issues in dispute during litigation. Allowing parties easily to set aside or modify stipulations would defeat this purpose, wasting judicial resources and undermining future confidence in such agreements." Waldorf v. Shuta, 142 F.3d 601 (3d Cir. 1998) (citations omitted).

In the case *sub judice,* Petitioners entered into seven Consent Orders while represented by legal counsel. The Consent Orders each contain Petitioners' stipulation to their indebtedness to Respondent, acknowledgment of default on their duties and obligations to Respondent under the terms of the preceding Consent Orders, and consent to relief from the 11 U.S.C. § 362 automatic stay. Each Consent Order was approved by the Bankruptcy Court.

Petitioners nevertheless repudiate these repeated stipulations and consents. Interestingly, Petitioners neither deny that they defaulted on their duties and obligations to Respondent under the terms of the most recent Consent Order nor give any valid reason why the stipulations set forth in the Consent Orders should be set aside. This case is just another frivolous attempt by Petitioners to confound Respondent's efforts to enforce its legal and contractual rights.

Petitioners fail to refute the fact that they took no action regarding either the Confessed Judgment or the Consent Orders, all of which are now final judgments. The matters thereby adjudicated, including the amounts due to Respondent and the stipulations to relief from stay, are thus established for purposes of this case. *See* Grogan v. Garner, 112 L.Ed.2d 755, 111 S.Ct. 654 (1991) (holding that issue preclusion applies to bankruptcy proceedings); Graham v. IRS, 973 F.2d 1089 (3d Cir. 1992) ("Issue preclusion applies when '(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) that issue [was] actually litigated; (3) it [was] determined by a final and valid judgment; and (4) the determination [was] essential to the prior judgment. . . .'") (citations omitted); Bandai Am., Inc. v. Bally Midway Mfg. Co., 775 F.2d 70 (3d Cir. 1985), *cert. denied,* 475 U.S. 1047, 89 L.Ed.2d 574, 106 S.Ct. 1265 (1986) (holding that preclusive effect is given to issues parties agree to decide by consent decree).

Moreover, Petitioners' acknowledgment in their Amended Plan of Reorganization of Respondent's secured claim, coupled with their failure to object to the Proof of Claim, precludes Petitioners from now opposing Respondent's claim. *See* Corestates Bank, N.A. v. Huls Am., Inc. 176 F.3d 187 (3d Cir. 1999) (holding that confirmation of plan has collateral estoppel implications with regard to claims); Fed.R.Bankr.P. 3007 (setting forth procedure for objections to claims).

Petitioners do not and, indeed, cannot deny that they expressly consented to relief from the automatic stay. The doctrines of both waiver and equitable estoppel dictate that Petitioners' request for reinstatement of the stay was properly denied.

"The Pennsylvania Supreme Court has opined that the doctrine of equitable estoppel applies 'where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position . . . .'" *In re* IM, 256 B.R. 437 (Bankr.E.D.Pa. 2000) (quoting Ervin v. Pittsburgh, 339 Pa. 241, 14 A.2d 297 (Pa. 1940)). The doctrine of equitable estoppel has been further discussed as follows:

> Equitable estoppel is applied to avoid injustice in certain cases. It is triggered by the conduct of a party that is inconsistent with a position later adopted by it and which is prejudicial to the rights of another who relied on such conduct to their detriment. A party must prove the following in order to prevail on a traditional equitable estoppel claim: (1) a material misrepresentation; (2) reasonable reliance upon that misrepresentation; and (3) damage resulting from the misrepresentation.

In re Crain, 158 B.R. 608 (Bankr.W.D.Pa. 1994).

In the instant case, Petitioners consented, both affirmatively and by their acquiescence, to relief from the stay. In good faith reliance upon those consents, Respondent agreed, ***on seven separate occasions,*** to forbear from exercising its rights as creditor with regard to certain collateral and suffered damage as a result of that forbearance. Petitioners thus ought to be equitably estopped from asserting that they retain the benefit of the stay with regard to Respondent.

"Waiver may be established by a party's express declaration or by a party's undisputed acts or language so

inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary." Samuel J. Marranca Gen'l Contracting Co., Inc. v. Amerimar Cherry Hill Assoc. Ltd. P'ship, 416 Pa.Super. 45, 610 A.2d 499 (1992). In this case, Petitioners expressly stipulated to relief from the stay. Petitioners thereby waived any basis for asserting that they retain the benefit of the stay.

Even assuming, *arguendo,* that there was no express declaration by Petitioners, Respondent's reliance upon Petitioners' acquiescence to actions of their counsel gives rise to application of the doctrine of *implied* waiver. *See* *In re* F.B.F. Indus., Inc., 165 B.R. 544 (Bankr.E.D.Pa. 1994) ("[I]n Pennsylvania, the doctrine of implied waiver applies only in situations equivalent to equitable estoppel. To prevail the person claiming the occurrence of the waiver must show that he was misled or prejudiced by the other party's actions.") (citing Schifalacqua v. CNA Ins., 567 F.2d 1255 (3d Cir. 1977)).

4. Petitioners are bound by the actions of their attorneys.

"Even in ordinary circumstances, debtors totally unfamiliar with the bankruptcy process are bound by the actions of their attorneys." *In re* Quiles, 262 B.R. 191 (Bankr.D.R.I. 2001) (citation omitted). This Court expounded upon that principle as follows:

> [C]lients must be held accountable for the acts and omissions of their attorneys . . . . "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion

> would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P'ship, 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489 (1993) (citations omitted).

Assuming, *arguendo,* that Petitioners received ineffective assistance of counsel, Petitioners are nevertheless bound by the actions of their lawyers.

CONCLUSION

There is no compelling reason for this Court to reconsider its holdings on the foregoing matters.

The petition for a writ of *certiorari* must be denied.

Respectfully submitted,

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APPENDIX

Statutes

Title 11, United States Code, Section 362 (1998).

Automatic stay. (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . . .

* * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization . . . .

Title 28, United States Code, Section 157 (1994).

Procedures. (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to -

* * *

(G) motions to terminate, annul, or modify the automatic stay . . . .

Title 28, United States Code, Section 158 (1994).

Appeals. (a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from final judgments, orders, and decrees . . . .

* * *

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Title 28, United States Code, Section 1334 (1994).

Bankruptcy cases and proceedings. (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11 . . . .

Supreme Court Rules, Rule 10.

Considerations Governing Review on Certiorari. Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last

resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Federal Rules of Bankruptcy Procedure, Rule 3007.
Objections to Claims. An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

Federal Rules of Bankruptcy Procedure, Rule 8013.
Disposition of Appeals; Weight Accorded to Bankruptcy Judge's Findings of Fact. On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions

for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

(3)

Supreme Court, U.S.
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No. 03-1477

In The
Supreme Court of the United States

Gerald J. Gesiorski and
Dawn S. Gesiorski,
Petitioners,

v.

BRANCH BANKING & TRUST CO.,
f/k/a Carroll County Bank & Trust,
Respondents,

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit;
Questioning the Jurisdiction of
The United States Bankruptcy Court
For The Middle District of Pennsylvania,
Article I Judge

PETITIONERS REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. There is a compelling reason for this Honorable Court to, not reconsider, but, to determine the issue now placed before this Honorable Court; that Petitioners, in Reorganization which is an Equity Proceeding, must be heard before an Article III Judge as mandated by the Constitution.

2. There is a compelling reason for this Honorable Court to, not reconsider its holding that appellants who fail to preserve for appeal any issue which they failed to raise in the lower court and any matter as to which they failed to place into the record on appeal, but that the District Court Judge failed to look to the substance of the Complaint rather than the form in violation of this Honorable Courts holding.

3. There is a compelling reason for this Honorable Court to, not reconsider its holding that issue preclusion, which does not apply in this instant case, applies to bankruptcy proceedings, but, that the Mortgage Note was void, tainted with the contamination of the originating acts of the Officers of Carroll County Bank & Trust.

4. There is a compelling reason for this Honorable Court to, not reconsider its holding that litigants are bound by the actions of their attorneys, but, that this is an ongoing Reorganization proceeding which has never been concluded which Petitioners have effectively stood on the Table Top in the middle of Court and protested to the District Court Judge of the violations occurring within those proceedings.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW ..... -i-

TABLE OF CONTENTS ..... -ii-

TABLE OF AUTHORITIES ..... -iii-
FEDERAL CASES ..... -iii-
STATE CASES ..... -iii-
FEDERAL STATUTES ..... -iv-
OTHER AUTHORITIES ..... -iv-

I. CCB&T HAS CONCEDED THE ERROR OF THE COURT BELOW. ..... Page 1 of 4

II. THE LOWER COURT'S DECISION SHOULD BE VACATED AND REMANDED TO THE THIRD CIRCUIT TO CONFORM ITS DECISION TO THE INTERPRETATION OF THIS HONORABLE COURTS HOLDING TO LOOK TO THE SUBSTANCE OF THE COMPLAINT RATHER THAN THE FORM.
..... Page 1 of 4

III. THE MORTGAGE NOTE SHOULD BE DETERMINED TO BE VOID WHERE THE PRINCIPAL TRANSACTION WAS INVALID ON THE GROUND OF FRAUD. ... Page 2 of 4

IV. PETITIONER CANNOT BE HELD TO THE ACTIONS OF THEIR ATTORNEY IN AN ONGOING REORGANIZATION PROCEEDING NEVER CONCLUDED WHICH PETITIONERS HAVE DEMONSTRATED ATTORNEY ACTED WITHOUT AUTHORIZATION. ..... Page 2 of 4

CONCLUSION ..... Page 4 of 4

VERIFICATION ..... Page 4 of 4

TABLE OF AUTHORITIES
FEDERAL CASES

Garabedian v. Allstate Engineering Co., 811 F.2d 802 (3rd Cir. 1987) . . . . . Page 3 of 4, Page 4 of 4

Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 652 (1972) . . . . . Page 1 of 4

Haize v. Hanover Ins. Co., 536 F2d 576, 579 (3rd Cir. 1978) . . . . . Page 2 of 4

Holker v. Parker, 11 U.S. (7 Cranch) 436, 452, 3 L.Ed. 396 (1813) . . . . . Page 3 of 4

In re Siciliano 13 F.3d 748 (C.A.3 Pa. 1994) . . . . . Page 4 of 4

Lowden v. Northwestern National Bank & Trust Co. 298 U.S. 160 . . . . . Page 1 of 4

Osborne v. United States, 86 U.S. 577, 884 (1874) . . . . . Page 2 of 4

Pope Mfg. Co. v. Gormully, 144 U.S. 224, 236-37 . . . . . Page 2 of 4

Smith v. Delaware Valley Auto Spring Co., 642 F.Supp. 1112 (E.D.Pa. 1986) . . . . . Page 3 of 4

STATE CASES

Archbishop v. Karlak, 450 Pa. 535, 540, 229 A.2d 294, 297 (1973) . . . . . Page 3 of 4

Rothman v. Fillette, 503 Pa. 259, 264, 469 A.2d 5433, 545 (1983) . . . . . Page 3 of 4

Archbishop v. Karlak, 450 Pa. 535, 540, 229 A.2d 294, 297 (1973) . . . . . Page 3 of 4

Rothman v. Fillette, 503 Pa. 259, 264, 469 A.2d 5433, 545 (1983) . . .

. . . . . Page 3 of 4

FEDERAL STATUTES

11 U.S.C.S. § 362(d) . . . . . Page 4 of 4

28 U.S.C. § 1746(1) . . . . . Page 4 of 4

OTHER AUTHORITIES

7 Am.Jur.2d Attorneys at Law § 167, 206 . . . . . Page 3 of 4

7 Am.Jur.2d Attorneys at Law § 175, 214 . . . . . Page 3 of 4

H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 3 U.S.Cong.News '84, p. 596; 8725 Cong. Rec. - Senate, June 10, 1938 . . . . . Page 1 of 4

35456 Cong. Rec.-House, Oct. 28, 1977 . . . . . Page 1 of 4

35683 Cong. Rec. - House, Oct. 28, 1977; 35451 Cong. Rec. - House, Oct. 28, 1977 . . . . . Page 1 of 4

H.R. Rep. No. 95-595, 95th Cong., 2d Sess., 5 U.S.Cong.News '78, pp. 5991-92 . . . . . Page 1 of 4

H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., p. 595 . Page 1 of 4

Senate Doc. No. 65 . . . . . Page 1 of 4

Annotation, Authority of Attorney to Compromise Action, 30 A.L.R.2d 944 (1953) . . . . . Page 4 of 4

Broom's Legal Maxims, 285 . . . . . Page 2 of 4

Pursuant to Rule 15-6 of the Rules of the Supreme Court of the United States, Petitioners Gerald J. Gesiorski and Dawn S. Gesiorski submit this Reply Brief in response to the Brief in Opposition of Respondent Carroll County Bank & Trust (CCB&T).

I. CCB&T HAS CONCEDED THE ERROR OF THE COURT BELOW.

Respondent CCB&T does not defend the decision of this Honorable Court that "That reorganization is an equitable procedure, not one of bankruptcy" held in the case of *Lowden v. Northwestern National Bank & Trust Co.* 298 U.S. 160, 1936." Nor the concurrence of the Congress ("**[U]nless the district court has some independent basis for article III jurisdiction – diversity – will create constitutional problems as great as the problem solved by the amendments**" (emphasis added) H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 3 U.S.Cong.News '84, p. 596; 8725 Cong. Rec. - Senate, June 10, 1938; 35456 Cong. Rec.-House, Oct. 28, 1977; 35683 Cong. Rec. - House, Oct. 28, 1977; 35451 Cong. Rec. - House, Oct. 28, 1977; H.R. Rep. No. 95-595, 95th Cong., 2d Sess., 5 U.S.Cong.News '78, pp. 5991-92; H.Conf. Rep. No. 98-882, 98th Cong., 2d Sess., 3 U.S.Cong.News '84, p. 595.) and that of the Attorney General ("Report of the Attorney General on Bankruptcy Law and Practice" found within Senate Doc. No. 65, February 24, 1932).

II. THE LOWER COURT'S DECISION SHOULD BE VACATED AND REMANDED TO THE THIRD CIRCUIT TO CONFORM ITS DECISION TO THE INTERPRETATION OF THIS HONORABLE COURTS HOLDING TO LOOK TO THE SUBSTANCE OF THE COMPLAINT RATHER THAN THE FORM.

As a result of the lower court's decision to affirm the District Court's refusal to look to the substance of the Petitioner's Complaint instead of the Form as this Honorable Court has directed in *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed. 652 (1972), the District Court, being the court of original jurisdiction failed to address each issue placed before it as required ("No one can question that the court

which has jurisdiction of the principal question, must exercise jurisdiction over every question." *Osborne v. United States*, 86 U.S. 577, 884 (1874)), thereby placing Petitioners in harms way subject to foreclosure proceedings against our Home with no remedy at law.

III. THE MORTGAGE NOTE SHOULD BE DETERMINED TO BE VOID WHERE THE PRINCIPAL TRANSACTION WAS INVALID ON THE GROUND OF FRAUD.

Where "the principal transaction was invalid on the ground of fraud, according to the principle that a wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it; *nul prendra advantage de son tort demesne*. Broom's Legal Maxims, 285. The Respondent, seasoned in business, caused omissions and mistakes in the agreement which Petitioner relied upon to our detriment, which Respondent further attempted to conceal, misrepresent, and unfairly act upon. ("Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid.'... [S]pecific performance is not of absolute right, but one which rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity,..." *Pope Mfg. Co. v. Gormully*, 144 U.S. 224, 236-37).

Issue Preclusion does not apply in this instant case of Reorganization which is ongoing. The doctrines of issue preclusion (which applies only to each issue which has been litigated and decided, Haize v. Hanover Ins. Co., 536 F2d 576, 579 (3rd Cir. 1978)), waiver and equitable estoppel must not be permitted by this Honorable Court.

IV. PETITIONER CANNOT BE HELD TO THE ACTIONS OF THEIR ATTORNEY IN AN ONGOING REORGANIZATION PROCEEDING NEVER CONCLUDED WHICH PETITIONERS HAVE DEMONSTRATED ATTORNEY ACTED WITHOUT AUTHORIZATION.

Petitioner's Attorney has never received General or Specific

Power of Attorney nor Express Authority **to sign on behalf of the Gesiorskis** the Reorganization Plan or any of the numerous Consent Orders Granting Motions to Lift the Automatic Stay and for Adequate Protection. Gesiorskis have not established **either express, implied**, or **apparent authority** to enter into a settlement on Gesiorskis behalf and **rebut this presumption**.

"In general, an attorney has no authority to settle his client's case solely by virtue of his general power to handle the case. *Holker v. Parker*, 11 U.S. (7 Cranch) 436, 452, 3 L.Ed. 396 (1813). Instead, an attorney can only enter a binding compromise if the client has authorized him to do so." *Garabedian v. Allstate Engineering Co.*, 811 F.2d 802 (3rd Cir. 1987). "... Pennsylvania law clearly provides that an attorney must have express authority to settle litigation, *see e.g.*, *Rothman v. Fillette*, 503 Pa. 259, 264, 469 A.2d 5433, 545 (1983)." *Smith v. Delaware Valley Auto Spring Co.*, 642 F.Supp. 1112 (E.D.Pa. 1986). "An attorney-client relationship does not, without more, confer upon the attorney the authority to settle his client's case. *See, e.g.*, *Archbishop v. Karlak*, 450 Pa. 535, 540, 229 A.2d 294, 297 (1973); (*cites omitted*)" *Smith v. Delaware Valley Auto Spring Co.*, 642 F.Supp. 1112 (E.D.Pa. 1986).

"Although some cases have held that the control an attorney has over the conduct of a case impliedly authorizes him or her to bind the client by a confession of or consent to a judgment, other decisions maintain the view that **an attorney has no authority to enter a consent decree, or confess judgment without the client's direction, knowledge, or consent**, and if a consent judgment or decree is entered against the protest of the client, or contrary to his or her instructions not to compromise, **the judgment or decree will not be binding on the client**." 7 Am.Jur.2d Attorneys at Law § 175, 214. (emphasis added)

"During the progress of a trial, an attorney of record has implied authority to enter into stipulations and agreements respecting matters of procedure.... **but does not apply to matters affecting the cause of action itself**." 7 Am.Jur.2d Attorneys at Law § 167, 206. (emphasis added) "**In the absence of special authority**, a court will not uphold a stipulation that operates as a surrender of substantial rights of a client." 7 Am.Jur.2d Attorneys at Law § 167, 206. (emphasis added)

The **burden of proving** that attorney had actual, that is, **express or implied authority** to settle case **was on party asserting agency**.

Smith v. Delaware Valley Auto Spring Co., 642 F.Supp. 1112 (E.D.Pa. 1986). "[R]ebuttal of the presumption renders any purported settlement ineffective. *See generally* Annotation, *Authority of Attorney to Compromise Action*, 30 A.L.R.2d 944 (1953)." *Garabedian v. Allstate Engineering Co.*, 811 F.2d 802 (3rd Cir. 1987).

11 U.S.C.S. § 362(d) allows retroactive relief and validates proceedings that would otherwise be void ab initio; annulment can operate retroactively to rehabilitate violation of automatic stay. *In re* Siciliano 13 F.3d 748 (C.A.3 Pa. 1994).

CONCLUSION

The decision of the court below should be vacated and remanded to the Third Circuit to correct its ruling to conform with the directions of this Honorable Court.

VERIFICATION

We, Gerald J. Gesiorski and Dawn S. Gesiorski, do hereby verify under penalty of perjury under 28 U.S.C. § 1746(1), that the foregoing statements are true and correct, and this petition is made in good faith, is not frivolous, and is not interposed for the purpose of delay.

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